89-631

No.

In the Supreme Court of the United States

OCTOBER TERM, 1989

GERALD O. PHILPOT,

and

MOBILE MATERIALS, INC.,

Petitioners,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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178 pp

QUESTIONS PRESENTED FOR REVIEW

I

An indictment under Sherman Act, § 1 alleged a conspiracy to rig unspecified, unidentified asphalt paving bids, somewhere in Oklahoma, over the period from before July, 1978, to after February, 1982; but was otherwise indefinite as to time; identified no specific projects, jobs or bids as the objects of the alleged conspiracy; and no specific acts of conspiracy nor any co-conspirators.

The questions presented are:

(a) is the indictment in conflict with the decisions of this Court and the circuits as to the specificity and particularity required under the Fifth and Sixth Amendments to the United States Constitution? *Russell v. United States,* 369 U.S. 749 (1962); *United States v. Radetsky,* 535 F.2d 556 (10th Cir.), *cert. denied,* 429 U.S. 820 (1976); *United States v. Cecil,* 608 F.2d 1294 (9th Cir. 1979).

(b) can such a defect be remedied by a bill of particulars, or additional specifics set forth in subordinate counts arising out of the same alleged conspiracy?

II

Upon conviction under such an indictment, Petitioners were fined a combined total of $620,000.00 and the individual was sentenced to two concurrent terms of three years imprisonment. This was vastly disproportionate to other antitrust sentences, either in Oklahoma, in the "Roadrunner" investigations, or in the nation.

The question presented is:

Does a sentence so disproportionate conflict with the Sixth Amendment right to trial, and the Eighth Amendment prohibition against cruel and unusual punishment, absent any showing by the government of unusual circumstances? *Solem v. Helm,* 463 U.S. 277 (1983).

RULE 28.1 LISTING AND LIST OF ALL PARTIES BELOW

Mobile Materials, Inc. was a corporation the entire stock of which was owned by Petitioner Gerald O. Philpot and his son James Wayne Philpot equally. The corporation was not publicly listed or traded, and had no subsidiaries or affiliates. It was formally liquidated, dissolved, its assets were sold, and it ceased all business of every type and kind whatsoever in 1982, more than two years before the indictment was presented.

An affiliated partnership, Mobile Materials Company, was also indicted, and was acquitted of all charges. Thus it was not a party to the judgment of the Court of Appeals for which certiorari is here sought. There were no other parties at trial.

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OPINIONS BELOW

In this prosecution, there have been three appellate opinions.[1] The first, 776 F.2d 1476 (10th Cir. 1985), came on an interlocutory appeal by the United States in 1984, and reversed a dismissal of the indictment as to the corporation because of its prior dissolution. It is not included in the appendix because no review of that order is here sought.

The second, 871 F.2d 902 (10th Cir. 1989), App. p. A4, affirmed the conviction and the denial of the motion to dismiss the indictment (McKay, J., dissenting). Several points raised on appeal, closely related to the sufficiency of the indictment, were not disposed of because of perceived inadequacies of the record.

Having determined that the record presented on appeal had been in fact complete and available, the court, in a third opinion, July 28, 1989, 881 F.2d 866 (1989), App. p. A53, again affirmed. A separate order, entered the same day, denied the petition for rehearing, denied the suggestion for rehearing en banc, and denied the second suggestion for rehearing en banc, App. p. A1.

The original motion to dismiss was argued and provisionally denied from the bench November 29, 1984, pending review of Petitioners' Reply Brief, Tr. 11/29/84, App. pp. A109 et seq. However, the next day by letter Chief Judge Eubanks denied the motion, and adopted both the remarks at the hearing and the opinion of Judge Russell in *United States v. Cherokee Paving*, CR-84-148-R, App. pp. A122 et seq.

Sentencing was held March 8, 1986. Judge Eubanks' remarks at that time are set forth at App. pp. A129 et seq.

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1. References herein to the published 1985 ("Mobile I"), March 22, 1989 ("Mobile II") and July 28, 1989 ("Mobile III") Court of Appeals opinions are by official reporter. The latter two are also cited as "App. p. .....". References to the hearing remarks, and letter opinion of the trial court are by Appendix only.

His order provisionally denying Petitioner's motion under then-applicable Rule 35, Fed.R.Crim.P., to reduce sentence is found at App. p. A138. A renewed motion to his successor, Phillips, J., was denied September 12, 1989, App. p. A139, although mandate has not issued as of the date of filing this Petition for Writ of Certiorari.

JURISDICTION

Petitioners seek review of a decision of the United States Court of Appeals for the Tenth Circuit affirming a criminal conviction of violation of 15 U.S.C. § 1 and 18 U.S.C. § 1001. This Court's jurisdiction therefore is invoked pursuant to 28 U.S.C. § 1254(1) and Supreme Court Rule 20.1.

The conviction and sentence were affirmed by opinion dated March 22, 1989. Petition for rehearing was filed April 5, 1989 and a motion to supplement record on appeal was filed April 10, 1989. The motion to supplement was granted by order entered April 21, 1989. The petition for rehearing was denied by Order dated July 28, 1989, App. p. A1 and opinion of the same date, App. pp. A53 et seq.

A timely motion to extend time for filing petition for writ of certiorari was granted by Mr. Justice White September 13, 1989, extending the time to and including October 26, 1989, App. p. A3.

Mandate being stayed pending filing of Petition for Writ of Certiorari, no separate order of judgment has been issued, see Rule 36, Fed.R.App.P.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

UNITED STATES CONSTITUTION, AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or

indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

UNITED STATES CONSTITUTION, AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

UNITED STATES CONSTITUTION, AMENDMENT VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

15 U.S.C. § 1:

§ 1. Trusts, etc., in restraint of trade illegal; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dol-

lars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

18 U.S.C. § 3553:

The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—

(1) the nature and circumstances of the offense and history and characteristics of the defendant;

(2) the need for the sentence imposed—

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant;

. . .

(4) the kinds of sentence and the sentencing range established for the applicable category of offense committed by the applicable category of defendant as set forth in the [Guidelines of the U.S. Sentencing Commission, 28 U.S.C. § 994(a)(1)];

. . .

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct.

28 U.S.C. § 994(j):

The Commission shall insure that the guidelines reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a

first offender who has not been convicted of a crime of violence or an otherwise serious offense, and the general appropriateness of imposing a term of imprisonment on a person convicted of a crime of violence that results in serious bodily injury.

STATEMENT OF THE CASE

In affirming the conviction below, the United States Court of Appeals for the 10th Circuit has established a precedent, contrary to that of other circuits and the decisions of this Court, under which any indictment for conspiracy to violate the Sherman Act may be held Constitutionally sufficient if it tracks the statutory language and if sufficient detail is later furnished by a bill of particulars.

Operation Roadrunner was a code-name given a multi-state series of investigations and prosecutions into bid-rigging practices in federally-funded paving projects. It began in the late 70's and the most recent prosecution arising out of it was tried in early 1989. The various regional offices of the antitrust division prosecuted these cases. In Oklahoma, Kansas and Texas, the Dallas Regional Office was responsible.

Following indictments, prosecutions and pleas in Kansas and Nebraska, the investigation shifted to Oklahoma. In the fall of 1982, Dan Kavanaugh, of Oklahoma City, Oklahoma, and his company, Metropolitan Enter., Inc., were tried and convicted. *United States v. Metropolitan Enter., Inc.*, 728 F.2d 444 (10th Cir. 1984). The indictment in that case alleged a specific conspiracy to rig the bidding process on a specific job, at a specific time and place, with identified co-conspirators.

During that time, in an unrelated Kansas prosecution before Saffels, J., it was held following an evidentiary hearing that all bid-rigging activities in the State of

Kansas for many years had been part of a single, on-going conspiracy, which the government later came to characterize as a "plug-in" conspiracy. Until that time the government had prosecuted each rigged job as a separate conspiracy. Upon this finding, Judge Saffels held that an earlier acquittal on a charge of bid-rigging one Kansas project barred further prosecution on charges of rigging any other Kansas project. *United States v. Beachner Construction Co.*, 729 F.2d 1278 (10th Cir. 1984). See also *United States v. Broce*, ... U.S. ....., 109 S.Ct. 757, 760-761, 102 L.Ed.2d 927, 933-934 (1989).

In August of 1984 a Grand Jury sitting in the Western District of Oklahoma returned four "Roadrunner" indictments, one naming Petitioners. All were materially different from those previously returned, in that Count One of each, charging the conspiracy in restraint of trade, was singularly unspecific as to time, place, circumstances, co-conspirators, and acts constituting the conspiracy. Of the four, however, the indictment against Petitioners was the most vague, *United States v. Mobile Materials, Inc.*, 871 F.2d 902, 923 (10th Cir. 1989) (McKay, J., dissenting), App. pp. A48-A49.

Three of the four went to trial. In October of 1984, Billy Ray Anthony and Washita Construction Co. of Ardmore, OK, were convicted, *U.S. v. Washita Construction Co.*, 789 F.2d 809 (10th Cir. 1986). Two months later, Amis Construction Co. of Oklahoma City, Cherokee Paving Co., and Stuart Ronald, both of Ada, Oklahoma, were acquitted, *United States v. Cherokee Paving Co.*, No. CR-84-148-R (W.D. Okla.). The third, *United States v. Shawnee Paving Co.*, No. CR-84-145-W (W.D. Okla. 1984), was terminated by a plea bargain in which the corporate owner, Don Hurst, of Shawnee, OK, testified under immunity and his company pleaded guilty and was sentenced to a fine of $75,000.00.

Petitioners were tried in March of 1986. The history of this case is described at length in Mobile II, 871 F.2d at 905, 906, App. pp. A5-A6.

Two other companies, Glover Construction Co. of Poteau, OK and Frascon, Inc., of Lawton, have also been disposed of by corporate pleas and individual immunity and cooperation. Both Glover and the principal of Frascon, Mr. James Freeman, testified on behalf of the government against Petitioners.

Since Petitioners' trial, the antitrust division tried *United States v. Cummins Construction Co.*, No. CR-86-41-R, resulting in conviction of the corporation only, and fines totalling $105,000.00; and *United States v. Evans and Associates*, No. CR-86-77-P, resulting in acquittal on all counts.

The jury deliberated 2-1/2 days, and convicted Petitioners on a single conspiracy count and a single false swearing count, which related to and identified a specific project as the object of the conspiracy. On Counts Two, Four, Five, Six, and Seven charging mail fraud and false swearing, and identifying specific jobs and projects, all defendants were acquitted.

Petitioners had timely moved to dismiss the indictment as insufficient under the Fifth and Sixth Amendments to the Constitution of the United States. This ruling was one of the grounds for which reversal was sought.

On May 5, 1986, Judge Eubanks sentenced Petitioner Philpot to the maximum possible sentence: a term of three years on each count, to run concurrently, and a fine of $100,000.00 on the conspiracy count and $10,000.00 on the false swearing count. He sentenced the corporation, which was dissolved in 1982 with a net worth of less than $370,000.00, to pay a fine of $500,000.00 on the con-

spiracy count and $10,000.00, the maximum, on the false swearing count.

Pursuant to the suggestion by Judge Eubanks at the time of sentencing and again 120 days later (App. pp. A129-A138), Petitioners have twice sought reduction pursuant to Rule 35, Fed.R.Civ.P. They also appealed the magnitude of the sentence as being disproportionate under the circumstances, also unsuccessfully.

So far as material to this Petition, Count One of the Indictment charges:

OFFENSE CHARGED

14. Beginning at least as early as July 1978, and continuing thereafter at least through February 1982, the exact dates being unknown to the Grand Jury, the defendants and co-conspirators engaged in a combination and conspiracy in unreasonable restraint of trade and commerce in violation of Section 1 of the Sherman Act (15 U.S.C. section 1).

15. The aforesaid combination and conspiracy consisted of an agreement, understanding, and concert of action among the defendants and co-conspirators, a substantial term of which was to submit collusive, noncompetitive, and rigged bids to, or to withhold bids from, the Oklahoma Department of Transportation and the Oklahoma Turnpike Authority for the award of highway construction projects, some of which were federally funded.

16. For the purposes of forming and effectuating the aforesaid combination and conspiracy, the defendants and co-conspirators did those things which they combined to do, including:

(a) Discussing the submission of prospective bids on highway construction projects in Oklahoma;

(b) Agreeing upon the successful low bidder on highway construction projects in Oklahoma;

(c) Submitting intentionally high, noncompetitive bids, or withholding bids, on highway construction projects in Oklahoma; and

(d) Submitting bid proposals on highway construction projects in Oklahoma containing false, fictitious, and fraudulent statements and entries.

EFFECTS

17. The aforesaid combination and conspiracy had the following effects, among others:

(a) Prices for Oklahoma highway construction projects were fixed and established at artificial and noncompetitive levels;

(b) Competition for the award of Oklahoma highway construction projects was restrained, suppressed, and eliminated;

(c) The state of Oklahoma was denied the right to receive competitive bids for highway construction projects; and

(d) The State of Oklahoma and the United States of America were denied the benefits of free and open competition for the award of highway construction projects.

JURISDICTION AND VENUE

18. The aforesaid combination and conspiracy was formed and carried out, in part, within the Western District of Oklahoma within the five years preceding the return of this indictment.

Petitioners respectfully submit that the Court of Appeals for the Tenth Circuit erred in holding that this language passes constitutional muster; that its holding so far departs from the standards enunciated by this

Court in *Russell v. United States,* supra, and is so contrary to its own standards (e.g., *United States v. Radetsky,* supra), and those of other circuits (e.g., *United States v. Cecil,* supra), as to warrant this Court in granting a writ of certiorari; and, upon review, the convictions should be reversed and the indictments dismissed.

Petitioners further submit that the sentence was so harsh and disproportionate to those given to others convicted of the same crime that, in the absence of any factors to the contrary (none of which were demonstrated at sentencing), it was a violation of the prohibition against cruel and unusual punishment, as provided by the Eighth Amendment to the Constitution of the United States, *Solem v. Helm,* 463 U.S. 277 (1983), and of Petitioners' Constitutional right to trial, *Blackledge v. Perry,* 417 U.S. 21 (1974).

I

ARGUMENT

(a) The Vagueness and Lack of Specificity of This Indictment Is in Conflict With the Fifth and Sixth Amendments to the Constitution, With the Decisions of This Court and With Those of Other Courts of Appeal.

"Conspiracy, that 'elastic, sprawling and pervasive offense,' long has been recognized as difficult to define and even more difficult to limit." Blackmun, J., dissenting, *United States v. Broce,* supra, 109 S.Ct. 757, 102 L.Ed.2d 927, 947, quoting *Krulewitch v. United States,* 336 U.S. 440, 445 (1949) (opinion concurring in the judgment and opinion of the Court).

Or as the dissenter in this case below noted in an earlier case, the decisions of this Court as well as the Tenth Circuit mandate "vigilant caution" in assessing "the conspiracy quagmire." He continued:

> Although the theory of conspiracy . . . is one of the government's favorite weapons, we cannot forget that "[g]uilt with us remains individual and personal, even as respects conspiracies. It is not a matter of mass application." *Kotteakos v. United States*, 328 U.S. 750, 772 (1946).
>
> *United States v. Heath*, 580 F.2d 1011 (10th Cir.), *cert. denied*, 439 U.S. 1075 (1979) (McKay, J., dissenting).

The court below has often stated its adherence to these principles, as for example in *Frankfort Distilleries, Inc. v. United States*, in which Judge Bratton, for a divided Court, noted:

> Ordinarily it is not sufficient to charge the offense in the words of the statute creating the offense, unless the words themselves fully, directly, and expressly, without uncertainty or ambiguity, set forth all the essential elements necessary to constitute the crime intended to be punished.
>
> 144 F.2d 824, 830 (10th Cir. 1944), *rev'd in part on other grounds*, 394 U.S. 293 (1945).

That the Sherman Act was not such a statute was recognized in the next breath. Rather it

> . . . is couched in general language, it speaks in generic terms, and it fails to enter into details. It "has a generality and adaptability comparable to that found to be desirable in constitutional provisions." *Appalachian Coals, Inc. v. United States*, 288 U.S. 244, 53 S.Ct. 471, 474, 77 L.Ed. 825. It therefore is necessary that an indictment charging an offense under its provisions descend to particulars and allege the constituent ingredients of which the crime is

composed. *United States v. Armour & Co.*, supra. [137 F.2d 269 (10th Cir. 1943)].

Id.

In sustaining the indictment, the majority distinguished this Court's decision in *Russell v. United States*, 369 U.S. 749 (1962), and that of the Court of Appeals for the Ninth Circuit in *United States v. Cecil*, 608 F.2d 1294, on the ground that the present indictment contained more detail and what was missing was properly supplied by a bill of particulars. Relying rather on *United States v. Armour & Co.*, supra, *Frankfort Distilleries v. United States*, supra, and the cases cited by them, it held that this indictment was at least as detailed and substantial.

Petitioners respectfully submit that to approve this indictment, on the authority of those far more specific indictments, means, in effect, that in the Tenth Circuit at least, any conspiracy indictment tracking the statutory language will pass constitutional muster.

For example, although the majority (871 F.2d at 907, App. pp. A10-A11) pronounced the indictment more detailed "than the brief indictment" in *United States v. Cecil*, 608 F.2d 1294 (9th Cir. 1979) (per curiam), it is in fact *Cecil* that was prosecuted on the more detailed indictment. In the first place, *Cecil* was a marijuana import prosecution, the statute prohibiting which, in contrast to the Sherman Act, is itself extremely specific. In the second place, the conspirators there were identified by name. In the third place the indictment specifically set forth the violation charged, the importation of marijuana from Mexico. Although the time of the conspiracy was "open-ended in both directions" 608 F.2d at 1297, as was Petitioners', at least the time was identified to a five-month period.

By any test the *Cecil* defendants had more knowledge of the nature of the charges against them and a narrower base of relevance on which to prepare to meet the government's evidence than did Petitioners, who confronted charges encompassing hundreds of jobs, let during a nearly 44 month period, with the identity of the conspirators, the method, time, place and nature of the conspiracy totally unspecified, merely to be surmised.

It is possible that the nature of the crime charged colored the majority's assessment of the indictment. See discussion of *Russell v. United States,* supra, 871 F.2d at 909, App. pp. A13-A14. Undoubtedly Congress and our federal courts, speaking for our society as a whole, have in recent years taken a more stringent view of crimes against the economy in all its manifestations than in the earlier history of the Republic. See, e.g., Stevens, J., concurring, in *United States v. Broce,* supra, 109 S.Ct. at 767, 768; 15 U.S.C. § 1, 1974 Amendment, Pub.L. 93-528. But the gravity of the crime does not determine the strictness with which an indictment must be scrutinized. A small-town road contractor of limited education, successful first in the sand and gravel business, later as a paving contractor, is no less entitled to the protection of the Fifth and Sixth Amendments when accused of price fixing than is a career criminal accused of narcotics conspiracy, racketeering or bank robbery.

In the circumstances of this particular prosecution, the use of the vague, open-ended indictment, bare of specifics in every respect, had two critical consequences, favorable to the prosecution and adverse to the defense:

FIRST: To "prove" the existence of the long-running, unitary, "plug-in" conspiracy, the government was permitted to introduce extensive testimony pursuant to Rule 801(d)(2)(E), F.R.E., which, unless linked to Petitioners through the single conspiracy structure of the trial, would

have been mere hearsay, and not only hearsay but hearsay concerning crimes and events other than those charged. This testimony was to the effect that numerous jobs involving others had been rigged during the same time period charged by the indictment, and to complete the earlier bid-rigging scheme, it was necessary to set up later jobs, including jobs on which Petitioners bid. Thus was completed the circle of relevance and agency admissions to include the defendants on trial.

The admission of co-conspirator hearsay has always been recognized as a critical issue at best, *Bourjailly v. United States,* 483 U.S. 171 (1987). See discussion at 869, Mobile III, App. pp. A56-A57. But when admitted and convicted conspirators testify that they themselves rigged various jobs, the only link to the defendants on trial of which is that some of the same conspirators attempted to rig later jobs on which the Petitioners did bid, there is at least a clear risk of tainting the jury's consideration of the evidence against him with the evidence of misdeeds of others, at other times and other places.

Other government witnesses testified that they participated in rigging or "setting up" jobs, but that Petitioner Philpot (although present) took no part in the discussions of such activities. Such testimony was permitted over the strenuous objection of the defense. Even the court below was troubled by this, Mobile III, App. p. A66 (slip op. 16). Such testimony would have been inadmissible but for the breadth and vagueness of this indictment.

SECOND: The vagueness and lack of specificity of the indictment was justified by the contention that the conspiracy had long been in existence and was tacitly known to all in the business; thus Defendants were forced to review and defend against allegations and testimony covering a 43-month period (in fact the indictment and

testimony purported to extend the "conspiracy" in time far earlier than that) during which more than 700 projects were let for bidding by the Oklahoma Department of Transportation. Of those within Petitioners' five-or-six county area of operations, they reviewed and at least considered bidding on some in most months; and did bid on some, and were successful on some of those. Yet at trial testimony of admitted conspirators was received from which the jury could have found that Petitioners agreed to withhold a bid on a job far beyond the geographical area they had always operated in. Only the fact that he received the plans on that job and did not bid was offered to corroborate this unlikely assertion. Mobile III, App. pp. A58, A59 (slip op. 7-8).

In effect, then, the denial of the motion to dismiss this indictment (as to Count One), opened up for scrutiny every job ever let in Oklahoma and the activities of all who dealt with those jobs, even if there was no suggestion that the defendant had anything to do with them. This was (at least so far) an impossible burden imposed on the defense. The government's burden (and that of the defense) would have been far different under an indictment limited to the specific jobs charged under Counts Two through Seven or identified in the bill of particulars. The limits of relevancy and materiality would likewise have been far more clear and certain.

This Court, however, has often admonished members of its bar that it does not sit as a final court of review and appeal, nor to correct errors of the Appellate Courts. Counsel accepts this admonition, as we must. We do suggest that to permit the extension and broadening of the standards of specificity and particularity heretofore regarded as essential benchmarks of a constitutional indictment, rather than finding warrant in the very precedents cited by the court below, directly contravenes

them. Such an extension, if permitted by this Court, is dangerous to constitutional liberty, and broadly expands the prosecutorial powers of the executive at the expense of the grand jury. Such consequences of a decision merit the review and, if warranted on the merits its correction.

As with *Cecil*, supra, the cases relied on by the majority below in sustaining this indictment were much more detailed and specific. For example, *Frankfort Distilleries, Inc. v. United States,* charged a specific conspiracy beginning at definite dates, 144 F.2d at 835. In addition to the conspiracy itself, numerous definite acts from which the conspiracy could be both inferred and by which it was created and carried out, were set forth. Participants were named and the mechanisms of fixing the prices, and enforcing the price fixing agreements were specified.

In *Frankfort Distilleries*, as here, the government did not *charge* a definite, specific agreement formed at any one time to rig prices; instead "counsel for the government admitted it . . . rel[ied] . . . upon acts and circumstances from which a conspiracy may be implied." Phillips, J., dissenting, 144 F.2d at 835. Nonetheless, the *Frankfort Distilleries* indictment was so specific that the recitation of its facts required three columns in the published opinion (144 F.2d 831-833). See also the recitation and analysis of the dissent which nevertheless found the indictment insufficient, 144 F.2d at 835-841.

Although in the trial of Petitioners, some government witnesses testified to conspiratorial acts allegedly involving Petitioners (testimony of Freeman, Glover, and Hurst and Jacobs), others were allowed to testify to acts with no identifiable relation to Petitioners at all (testimony of Baldwin, Beyer, Taylor). NONE of those acts, however, were identified in or by the indictment, and Petitioners were thereby seriously hampered in meeting the

testimony of those accusers. Petitioners urge this Court to establish as a standard that if the government is to prove a general conspiracy by specific acts it should at a minimum be required to identify them with some measure of particularity in the indictment presented to the grand jury and returned by it.

The majority below asserts (871 F.2d at 907, App. pp. A10-A11) that the Ninth Circuit "reject[ed] the application of *Cecil* to a Sherman Act indictment" in *United States v. Miller*, 771 F.2d 1219, 1227 (Ninth Cir. 1985). With respect, Petitioners submit it did not. The *Miller* Court merely noted that an indictment (antitrust or otherwise) open-ended as to time MAY STILL BE SAVED by sufficient other particulars. The vice of the *Cecil* indictment, as glossed by *Miller*, was that it was particular NEITHER in time, nor in any other circumstances so as to permit the indictment, viewed as a whole, to pass constitutional muster.

The *Miller* indictment listed the actions which the co-conspirators took to carry out their conspiracy; it set forth the means and steps by which they enforced their conspiratorial decisions; it charged that the co-conspirators discussed and agreed to price increases and to the resolution of pricing differences during meetings and by telephone; it fixed the location of the conspiracy within a single county in Idaho; and identified 12 co-conspirators who participated in the scheme. Having identified a specific agreement, the methods, time, place and participants in it, and the criminal effect of it, no overt acts in furtherance of it were necessary to frame a proper indictment, *Nash v. United States*, 229 U.S. 373, 378 (1913).

The indictment here did none of these things. It charges only a general, unitary, long-running conspiracy, which it is not alleged Petitioners participated in forming,

nor is there the slightest indication of how, when or where they joined in it.

Of the conspiracy itself is set forth only that it existed over a long span of time (including a time when Petitioners were in business), that its purpose was to fix and affect the competitive bidding process for paving contracts in Oklahoma, and that Petitioners were a part of it. Thus the nature and proof of the conspiracy itself depends entirely upon the particulars of the overt acts said to demonstrate the conspiracy. Yet none are charged nor even identified.

There is a fundamental difference between charging a particular conspiracy to fix prices and charging a general conspiracy to rig prices with no suggestion of what facts and circumstances imply the general, tacit conspiracy. To follow the latter course, as Judge McKay correctly suggests (871 F.2d at 921, App. p. A44), does no more than to dress up the language of the statute in prosecutorial legalese. But without either the particulars of the conspiracy agreement itself (which in this case the government admits existed only tacitly and by inference and generalized knowledge of those in the industry), or the particulars of the acts said to demonstrate the existence of the generalized, tacit conspiracy, it is literally impossible to know what proof must be met until it begins to come in. Surely the Fifth and Sixth Amendments require more of an indictment than that "a crime has been committed, in violation of this statute, and the grand jury believes there is probable cause that the defendants committed or participated in it".

To the extent that the majority below found the necessary particulars in Paragraph 16 of the indictment, Petitioners submit that the language does no more than, as Judge McKay noted, coarsely parse four types of con-

duct by which the conspiracy was furthered, but fails to provide specifics of time, place and circumstances necessary to tell these specific defendants which of their specific acts constituted the alleged offense. For that Defendants were required to circle the wagons around all of Oklahoma and search for alleged acts or events of as much as eight years earlier on which, in the hindsight of an immunized witness and a zealous prosecutor, there might be placed an anticompetitive, conspiratorial interpretation.

As the dissent points out, contrary to the assertions by the government and the majority, Petitioners do not contend that the government must disclose its evidence as part of a constitutional indictment, nor have they sought to compel it by their efforts to make the indictment deal in particulars. Rather they sought only to have the government disclose and define the factual allegations against them which it hopes to support with its evidence.

The government and the majority also rely on the prior decisions in this same series of conspiracy prosecutions (*Metropolitan Enterprises*, supra, and *Washita Construction Co.*, supra) as well as *United States v. Fischbach & Moore*, 750 F.2d 1183 (3rd Cir. 1984), *cert. denied*, 470 U.S. 1029 (1985). But in *Washita*, the specific projects on which the conspiracy allegations rested *were* identified, 789 F.2d at 812, n.3, by date of letting and project number; moreover, the sufficiency of the indictment was not challenged on appeal in either of the latter, and in *Fischbach* the opinion was insufficient to determine how specific the indictment really was, 871 F.2d at 923-924, n.3, App. pp. A48-A49.

The government and the majority below cite various cases where indictments challenged for vagueness were held constitutionally sufficient. As the dissent noted, those were substantially more detailed than in this case.

The majority below, moreover, ignores the many cases which have read the Sixth Amendment more strictly in assessing indictments, e.g., *Russell,* supra; *United States v. Hess,* 124 U.S. 483, 487 (1888); *United States v. Horton,* 676 F.2d 1165, 1169 (7th Cir. 1982), *cert. denied,* 459 U.S. 1201 (1983); *United States v. Nance,* 533 F.2d 699 (D.C. Cir. 1976); *United States v. Curtis,* 506 F.2d 985 (10th Cir. 1974). The Sherman Act is simply too general to support an indictment which merely tracks its language, *United States v. Tomasetta,* 429 F.2d 978, 979 (1st Cir. 1970). The Court of Appeals for the Eleventh Circuit, while upholding an indictment tracking the statute, explicitly disavowed that such was in and of itself sufficient:

> Hence, the indictment's tracking of the statutory language, *supplemented by the precise allegations* of the time and place of the criminal activity, the names of the participants and the controlled substance involved would appear entirely sufficient.
>
> *United States v. Ramos,* 666 F.2d 469, 474 (11th Cir. 1982) [Emphasis supplied].

Such an indictment under the Sherman Act was disavowed as long ago as 1918 (*United States v. Colgate,* 253 F. 522 (D.Ct. Va. 1918), *aff'd,* 250 U.S. 300 (1919)), as recently as 1977 (*United States v. Braniff Airways, Inc.,* 428 F.Supp. 579 (W.D. Tex. 1977) (dismissing the indictment on other grounds)) and frequently in the interim, *United States v. Greater Kansas City Chapter, NECA,* 82 F.Supp. 147 (W.D. Mo. 1949); *United States v. Waltham Watch Co.,* 47 F.Supp. 524 (S.D.N.Y. 1942); *United States v. Tarpon Springs Sponge Exchange,* 142 F.2d 125 (5th Cir. 1944); *Industrial Building Materials, Inc. v. Interchemical Corp.,* 278 F.Supp. 938 (C.D. Cal. 1967); *United States v. French Bauer, Inc.,* 48 F.Supp. 260 (S.D. Ohio 1942), *appeal dism'd.,* 318 U.S. 795 (1943).

See also *United States v. Hinkle*, 637 F.2d 1154 (7th Cir. 1981), a case arising under 21 U.S.C. § 843(b), which may be compared to 15 U.S.C. § 1 for this analysis (indictment ". . . must specify the type of communication facility used, the date on which it was used, the controlled substance involved and some sort of statement of what is being facilitated with that controlled substance which constitutes a felony") 637 F.2d at 1158.

In summary, the Tenth Circuit's adoption of the precedents it cites to support this indictment assuredly and inevitably weakens the Fifth and Sixth Amendment grand jury and double jeopardy protections. It is the function of this Court to stand as the last bastion to protect those rights and liberties against error, no matter how well motivated or firmly grounded in desired or desirable social policy. If this indictment is sufficient, it is hard to imagine one which is not.

(b) The Conspiracy Count of the Indictment May Not Be Saved by the Inclusion of Additional Detail in the Bill of Particulars, or in Subordinate Counts.

It is undisputed that Counts Two-Seven of the indictment (which arise out of and include the conspiracy count language) as well as the various bills of particulars, furnish considerably more detail concerning the prosecution than did Count One standing alone. The problem then and now was that nothing limited the government's proof of the conspiracy to those jobs and it is not possible to know if the grand jury indicted on the conspiracy embracing those jobs, or on something else.

It is apparent that the majority relied heavily on the disclosures of the bill of particulars (and amended and second amended bills) in sustaining the indictment, see discussion at 871 F.2d 907 et seq., App. pp. A11, A13, as did Judge Eubanks, Tr. 11/29/84, App. pp. A111 et seq. But the teaching of *Russell* is that a defective indictment

may not be saved by a bill of particulars, *Russell v. United States,* supra, 369 U.S. at 769-771. Thus, if Count One is not sufficient on its own analysis, whatever is contained in the bill of particulars is irrelevant.

Whatever information the bills of particulars supplied, they did not limit the breadth and vagueness of Count One, which gave the government carte blanche to roam ad lib over the entire landscape of the Oklahoma paving industry for many years. Had the government been strictly required to first prove the alleged single, overarching conspiracy, without resorting to evidence which was hearsay as to Petitioners, as was done in *Beachner,* that fault might have been alleviated. Instead, evidence of the existence of the conspiracy was so entertwined with testimony about Petitioners' participation in it that the jury could not have been expected to separate them.

Such generality is usually condemned in a criminal prosecution. A defendant is entitled to be charged based on specific acts and conduct, not prior bad acts or possibly criminal offenses; and certainly not on the bad acts and criminal offenses of others, unless he is shown to have joined with them.

Petitioners ask now, as they asked the court below, not whether the government presented sufficient evidence to withstand a Rule 29 motion on one or more particular jobs, but whether the jury's consideration of the evidence as to those jobs was colored and tainted by the flouting of evidence of the long-running conspiracy, including events at times and places in which Petitioners had no part.

Certainly it made the government's job easier to bring in admitted conspirators from other states and have them testify as to the Oklahoma conspiracy, even though they could not even recognize the defendant on

trial or know whether he had any part in it. But is this a fair trial? And would any unfairness have been prevented by requiring the government to be specific and precise as to the time, place, method and circumstances by which the single, long-running conspiracy was created and continued?

Petitioners submit that Judge McKay's analysis of the subordinate counts of the indictment and the bill of particulars is the more considered and, in the end, the more consonant with the requirements of the Constitution. As he noted,

> Though these charges are rooted in the appellants' participation in the Oklahoma highway construction industry, we may not pour their particulars into the empty allegations of count one. To do so would threaten the appellants with factual assertions that may not have been presented to the grand jury, a result which, as we explained in [*United States v.*] *Radetsky* [535 F.2d 556 (10th Cir. 1976)], the Fifth Amendment will not abide.
>
> 871 F.2d at 921, App. pp. A44-A45.

II

The Fines Imposed Were "Excessive" and the Sentence of Imprisonment Was "Cruel and Unusual Punishment" Within the Meaning of the Eighth Amendment, Under the Facts of This Case.

Congress has prescribed a range of penalties for the crimes of which Petitioners were convicted. Despite the fact that the government has not even suggested any exacerbating factors to warrant it, the individual Petitioner received the maximum fine and sentence of incarceration. The corporation was likewise sentenced to a fine of one half the maximum, far more than its net worth at the time it was dissolved.

Mr. Philpot could have received no harsher sentence were he a repeat offender, or a ringleader of bid-rigging in the Mid-West and elsewhere, such as those described in *United States v. Broce*, 753 F.2d 811 (10th Cir. 1985); 781 F.2d 892 (10th Cir. 1986); *rev'd*, ... U.S. ....., 102 L.Ed.2d 927, 109 S.Ct. 757 (1989). Had his corporation, jointly owned with his son, not been already dissolved, the fine imposed would have more than destroyed its net worth. By comparison the fines imposed on those admitted ring-leaders left their companies fully solvent and functional. Yet, apart from the conviction in this case, the testimony at trial and pre-sentence information showed that Mr. Philpot was a modern Horatio Alger.

This Court held in 1983 that

> The principle that a punishment should be proportionate to the crime is deeply rooted and frequently repeated in commonlaw jurisprudence. In 1215 three chapters of Magna Carta were devoted to the rule that "amercements"[8] may not be excessive. And the principle was repeated and extended in the First Statute of Westminster, 3 Edw. 1, ch. 6 (1275).
>
> *Solem v. Helm*, 463 U.S. 277, 284 (1983).

The footnote states:

> An amercement was similar to a modern-day fine. It was the most common criminal sanction in 13th Century England. See 2 F. Pollock & F. Maitland, *The History of English Law*, 513-515 (2d Ed. 1909).

The opinion goes on to note that the royal courts invalidated disproportionate fines under those and similar enactments, id. at 284-285, and that the same protections were carried through to the Eighth Amendment by the English Bill of Rights and the Virginia Declaration of Rights, id., fn. 10.

The Court then concluded its historical review:

> Although the Framers may have intended the Eighth Amendment to go beyond the scope of its English counterpart, their use of the language of the English Bill of Rights is convincing proof that they intended to provide at least the same protection—including the right to be free from excessive punishments.
>
> Id. at 286.

While the proportionality analysis has usually been applied to corporal and capital sentences, both the historical review and the ratio decidendi of *Solem* make it clear that it is not limited to those cases. As the majority noted, ". . . no penalty is *per se* constitutional." Id. at 290. And giving due weight to the legislative authority to determine the types and limits of punishments for crimes as well as to the discretion vested in the trial courts to visit them on offenders, weighing this sentence against the factors listed there lead to the conclusion that an unconstitutional injustice has been perpetrated in this case.

Those factors are set forth at page 291 of *Solem*:

First, the gravity of the offense and the harshness of the penalty. There can be no doubt that a price-fixing conspiracy is a serious offense, if not among the most serious non-violent, non-treasonous of crimes in the federal code. By the same token, there are various degrees of seriousness of any crime, even of a price-fixing conspiracy. These degrees were recognized and adopted by the Antitrust Division itself, Justice Department Guidelines for Sentencing Recommendations in Felony Cases under the Sherman Act, Feb. 24, 1977, reprinted in ABA, Criminal Antitrust Litigation Manual, 1983, p. 438, pp. 446, 447, and by the United States Sentencing Commission Statute, 28 U.S.C. §§ 991 et seq., esp. § 994. To

recognize this fact is to recognize that the imposition of the maximum sentence where there are no objective factors to warrant it, is arbitrary, and thus "cruel and unusual" punishment.

Second, in judging the constitutionality of a sentence, sentences imposed on other defendants in the jurisdiction for the same crime should be compared.

The most serious offender, Broce, organizer, ringleader, and enforcer of the conspiracy, whose family-owned corporation was a multi-million dollar, multi-state operation, pled guilty to two separate conspiracies and was sentenced to two years incarceration on each count, concurrent. From the record recited by the Tenth Circuit in Broce I (753 F.2d 811 (1985)) it is apparent that the government's plea bargain forestalled further indictments on other jobs extending over the entire history of bid-rigging in Kansas. Thus, for his cooperation, instead of a lesser sentence, the government did not prosecute on additional available charges. No Broce manager, including family members, was prosecuted.

Thus, for a long history of antitrust violations, the fine given Broce Construction (a large multi-state corporation) was only one-third larger than that given to Petitioner Mobile Materials, Inc. Its economic effect on Broce, compared to Mobile was negligible.

Petitioners note that the Justice Department guidelines speak of fines as an ALTERNATIVE to prison sentences, and recommend corporate fines at a base level of $100,000.00.

The sentences given the Oklahoma defendants who bargained for immunity have ranged from $75,000.00 to $100,000.00. For the three other defendants who chose to stand trial and were convicted the sentences were 18 months and 24 months incarceration (Anthony and

Kavanaugh) and combined fines ranging from $105,000.00 (Cummins Construction Co.) to $126,000.00 (Anthony).

In Texas, the same antitrust division regional office responsible for this prosecution obtained 21 corporate convictions and 16 individual convictions. The average corporate fine has been $113,390.48; the average individual fine has been $25,775.00. There have been NO jail terms given. (Source, Commerce Clearing House, Trade Regulation Reports, New Cases, 1986, Vols. IV and V).

Third, *Solem* calls for an examination of sentences imposed for the same offenses in other jurisdictions. The Administrative Office of the United States Courts, in its 1985 Report, Federal Offenders in the United States Courts, reports that in the year ending June 30, 1985 (the last full year prior to Petitioners' sentence) there were, nationwide, 131 defendants sentenced for all antitrust offenses. Of those, 19 were sentenced to incarceration, the average term of which was 7.1 months. Forty-one received probated sentences and 71 were sentenced to fines only. Id., Tables D-5 and H-13. App. pp. A140, A141. In only one year since 1970 had the average sentence nationwide (11.3 months, 1982) exceeded 1985, and in only two had the total number of imprisonment sentences exceeded it (1981 - 52, 1982 - 48). In no case since 1970 had any sentence of imprisonment been as long as the one imposed here, and there were only three sentences falling in the range of from 13 to 35 months in that same period. Figures for the years through June 30, 1989 are entirely comparable. To date, only two reported sentences have fallen in the 36-month range, of which, it must be assumed, Petitioner's is one.

By the calculus of *Solem*, the sentence imposed here, both fine and imprisonment, was excessive, disproportionate, and therefore unconstitutional. Although Judge

Eubanks at the sentencing hearing May 8, 1986 indicated that he might well reduce the sentence pursuant to Rule 35, following the conclusion of the appellate process (Tr. 5/08/86, App. pp. A135-A136), he left the bench in 1987 while the matter was still under advisement by the Tenth Circuit. His successor felt unconstrained by Judge Eubanks' statements on the record. App. p. A139.

The government in its brief in opposition to the Rule 35 motion (pp. 3-5) has suggested that Petitioners merited their sentence by their decision to stand trial; but such a view, if adopted by the Court, would have been a "per se violation of [Petitioners'] Sixth Amendment right to trial," *Blackledge v. Perry*, 417 U.S. 21, 28 (1974); *Santobello v. New York*, 404 U.S. 257, 263 (1971); *Fielding v. LeFevre*, 548 F.2d 1102 (2d Cir. 1977); see *United States v. Capriola*, 537 F.2d 319 (9th Cir. 1976); *compare, United States v. Hall*, 778 F.2d 1427 (9th Cir. 1985).

"The . . . inquiry broad in scope, largely unlimited either as to the kind of information [which the sentencing judge] may consider or the source from which it may come . . ." *United States v. Tucker*, 404 U.S. 443, 446 (1972), is a pointless gesture to the record, if all information disclosed is to be disregarded. In this case, the nature and extent of Petitioners' participation in the conspiracy, as found by the jury, the information in the pre-sentence report and in the numerous character letters recommending leniency, all afforded grounds for the maximum leniency, instead of the maximum punishment. Yet if Mr. Philpot's prior record, reputation, and character had been of the blackest, he could have been treated no more harshly.

The conclusion is inescapable on this record that his sentence was punishment for having stood trial.

Gerald Philpot, unlike Jerry Buckley Helm, did not receive the "penultimate sentence" (463 U.S. at 303), he received the *ultimate* sentence possible for this crime; his corporation likewise received the corporate death sentence. These sentences can not be justified by any objective factor. They are therefore contrary to the Eighth Amendment and to *Solem v. Helm* and *Blackledge v. Perry*.

CONCLUSION

THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT SHOULD BE GRANTED.

UPON REVIEW, THE INDICTMENTS SHOULD BE DISMISSED AND THE CONVICTIONS REVERSED.

IN THE ALTERNATIVE, THE SENTENCES SHOULD BE VACATED AND THE CASE REMANDED FOR RESENTENCING.

Respectfully submitted,

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Of Counsel:

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October 13, 1989

CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of October, 1989, copies of this Petition for Writ of Certiorari were mailed, postage prepaid, to Andrea Limmer, Esq., Asst. U.S. Attorney, U.S. Department of Justice, Antitrust Division, Room 3315, 10th and Pennsylvania Avenue N.W., Washington, DC 20530. I further certify that all parties required to be served have been served.

MACK MURATET BRALY
Counsel for Petitioners

APPENDIX

(Filed July 28, 1989)

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 86-1756

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

GERALD O. PHILPOT; MOBILE MATERIALS, INC.,
Defendant-Appellant.

ORDER

Before HOLLOWAY, McKAY, LOGAN, SEYMOUR, MOORE, ANDERSON, TACHA, BALDOCK, BRORBY, and EBEL, Circuit Judges.

Our opinion filed today is responsive to the petition for rehearing.

The suggestion for rehearing en banc and the second suggestion for rehearing en banc were transmitted to all the judges of the court in regular active service in accordance with Rule 35(b) of the Federal Rules of Appellate Procedure. As to the suggestion for rehearing en banc, a poll having been taken, the suggestion is denied.

Judges McKay, Seymour and Ebel would grant rehearing en banc. As to the second suggestion for rehearing en banc, no judge in regular active service having called for a poll, the second suggestion is also denied.

Entered for the Court

Robert L. Hoecker
Clerk

/s/ Patrick Fisher
By Patrick Fisher
Chief Deputy Clerk

(Dated September 13, 1989)

SUPREME COURT OF THE UNITED STATES

No. A-209

Gerald O. Philpot and Mobile Materials, Inc.,
Petitioners,

v.

United States.

ORDER

UPON CONSIDERATION of the application of counsel for the petitioners,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled case, be and the same is hereby, extended to and including October 26, 1989.

/s/ Byron R. White
Associate Justice of the Supreme
Court of the United States

Dated this 13th day of September, 1989.

(Filed March 22, 1989)

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 86-1756

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

MOBILE MATERIALS, INC. and
GERALD O. PHILPOT,
Defendants-Appellants.

Appeal From the United States District Court
for the Western District of Oklahoma
(D.C. No. CR-84-147-E)

Mack Muratet Braly of Mack Muratet Braly & Associates, Tulsa, Oklahoma, for Defendants-Appellants.

Andrea Limmer, Attorney, Department of Justice, Washington, D.C. (Douglas H. Ginsburg, Assistant Attorney General; W. Stephen Cannon, Deputy Assistant Attorney General; and John J. Powers, III, Attorney, Department of Justice, Washington, D.C., with her on the brief), for Plaintiff-Appellee.

Before McKAY, MOORE, and BALDOCK, Circuit Judges.

PER CURIAM.

This case arose as one of several prosecutions in a campaign by the Justice Department to rid the Oklahoma

and Kansas highway construction industry of anticompetitive bidding practices. In view of the issues on appeal, it will be helpful to recite the procedural history of the case in some detail.

On August 22, 1984, a grand jury sitting in the Western District of Oklahoma returned a seven-count indictment against Mobile Materials, Inc. (the Corporation), Mobile Materials Company (the Partnership), and Gerald O. Philpot, the president of both firms. Count one of the indictment charged all three defendants and unnamed coconspirators with participation in a conspiracy to submit rigged bids to, or withhold bids from, the Oklahoma Department of Transportation and the Oklahoma Turnpike Authority in violation of section 1 of the Sherman Act, 15 U.S.C. § 1 (1982). Counts two and three charged Mr. Philpot and the Corporation with making false, fictitious, and fraudulent statements to the United States Department of Transportation in violation of 18 U.S.C. § 1001 (1982); and counts four through seven charged all three defendants with mail fraud under 18 U.S.C. § 1341 (1982) in connection with the progress payments claimed from the state of Oklahoma.

Prior to trial, the defendants moved to dismiss the indictment on the ground that both the Corporation and the Partnership had been dissolved more than two years before the indictment was returned. The district court granted the motion as to the Corporation and the Partnership, finding its ruling compelled by our decision in *United States v. Safeway Stores*, 140 F.2d 834 (10th Cir. 1944). The court declined to dismiss the criminal charges lodged against Mr. Philpot, however, reasoning that its order as to the Corporation and Partnership had no bearing on the allegations against him and no effect on the government's burden of proof. Rec. vol. I, doc. 37 at 4-5.

Subsequently, the government filed an interlocutory appeal under 18 U.S.C. § 3731 (1982 & Supp. IV 1986) to contest the district court's dismissal of the indictment and moved for a continuance in the prosecution of Mr. Philpot under section 3161(h)(8) of the Speedy Trial Act, 18 U.S.C. §§ 3161-3174 (1982 & Supp. II 1984). The district court granted the government's motion, concluding that "the ends of justice served by granting such a continuance outweigh the best interests of the public and the Defendant in a speedy trial." Rec. vol. I, doc. 49 at 1. The government's appeal was presented to us in the case of *United States v. Mobile Materials, Inc.*, 776 F.2d 1476 (10th Cir. 1985).

In *Mobile Materials*, we reversed the district court's ruling that under Oklahoma law a criminal prosecution cannot be maintained against a corporation that was dissolved before the return of the indictment. On December 9, 1985, we issued a mandate to the district court to conduct further proceedings in the prosecution of the three defendants consistent with that holding. As a first step in reactivating the prosecution, the district court held a status conference on January 9, 1986, in which it granted requests by both parties for permission to file motions and amended documents. Rec. vol. I, doc. 59.

Following an eight-day jury trial begun on March 3, 1986, the Partnership was acquitted of all charges. However, Mr. Philpot and the Corporation were convicted of the Sherman Act violation and one count of making false and fraudulent statements to the United States Department of Transportation. The district court sentenced Mr. Philpot to serve two concurrent three-year terms of imprisonment and to pay fines totaling $110,000. The court also imposed fines totaling $510,000 against the Corporation.

On appeal, Mr. Philpot and the Corporation (the appellants) raise four issues: (1) whether the case should have been submitted to the jury on a theory of a grand conspiracy to rig bids, (2) whether the Speedy Trial Act was violated by the protracted length of the prosecution, (3) whether the trial judge's attitude and demeanor convinced the jury that the judge thought the appellants were guilty, and (4) whether the sentences were grossly disproportionate to others given for the same crimes and imposed without regard for the circumstances of the defendants.

Sufficiency of the Indictment

Under the general heading of the first issue presented, the appellants raise several arguments. We only consider the contention that the indictment is insufficient.[1, 2] Appellants suggested below that count one failed to provide

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1. Under the general heading of the first issue presented, appellants also argue that 1) coconspirator hearsay and evidence concerning "unrelated" jobs should not have been admitted, 2) there was a variance between the single conspiracy charged and the conspiracy proved at trial because the rigged bids were actually multiple conspiracies and 3) the government should not have informed the jury that its witnesses had rigged bids and were immunized. We do not reach these issues because of appellants' failure to designate the trial transcript for our review. *See* Appellants' Designation of Record on Appeal filed September 29, 1986 (failing to designate complete trial and sentencing transcript). The few pages of trial transcript that were designated, rec. vols. II, III, IV and V, simply do not address the evidence concerning these points. As expected, the parties differ sharply concerning characterization of that evidence.

2. The appellants offer only a cursory argument on this issue in their Brief in Chief. They refer us, however, to their Brief in Support of the Motion to Dismiss Count One for Vagueness, a document submitted to the district court and now included as part of the record before us. It is in the supporting brief that the appellants ground their objection to the language of count one in the guarantees of the fifth and sixth amendments. Rec. vol. I, doc. 44 at 4-6.

sufficient information to enable them to prepare a defense, contrary to the sixth amendment to the United States Constitution. They also argue that count one may be based on facts not presented to the grand jury, contrary to the fifth amendment.

The sufficiency of an indictment is judged by 1) whether the indictment contains the elements of the offense and apprises the defendant of the charges he must meet and 2) whether the defendant would be protected against double jeopardy by a judgment on the indictment. *Hamling v. United States*, 418 U.S. 87, 117 (1974). Appellants' real complaint about count one of the indictment is that its breadth allowed the introduction of co-conspirator testimony and allowed the jury to consider evidence of a single conspiracy to rig bids, of which the appellants were a part. Appellants' Brief-In-Chief at 12-14 (citing *United States v. Heath*, 580 F.2d 1011, 1026 (10th Cir. 1978) (McKay, J., dissenting), *cert. denied*, 439 U.S. 675 (1979)). Indeed, appellants have challenged the admissibility of co-conspirator statements and the sufficiency of the evidence to support a single conspiracy, but have not provided us with those portions of the transcript needed for our review. *See, e.g., United States v. Washita Constr. Co.*, 789 F.2d 809, 821-22 (10th Cir. 1986) (court reviewed trial testimony and judge's findings in rejecting defendants' claims that co-conspirator hearsay admitted improperly). We decline to consider these issues in the absence of a record containing those portions of the transcript on which the parties rely.[3]

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3. Fed. R. App. P. 10(b)(2) provides:

(2) If the appellant intends to urge on appeal that a finding or conclusion is unsupported by the evidence or is contrary to the evidence, the appellant shall include in the

(Continued on following page)

United States v. Tedder, 787 F.2d 540, 542 n.2 (10th Cir. 1986); *United States v. Strand*, 617 F.2d 571, 577 (10th Cir.), *cert. denied*, 449 U.S. 841 (1980); *Rachbach v. Cogswell*, 547 F.2d 502, 504 (10th Cir. 1977).

Turning to the sufficiency of the indictment, the entire document may be considered. *United States v. Metropolitan Enter., Inc.*, 728 F.2d 444, 452-53 (10th Cir. 1984). For purposes of testing the sufficiency of the indictment, the essential elements of a conspiracy under §§ 1 & 2 of the Sherman Act are "time, place, manner, means and effect." *United States v. Greater Kansas City Retail Coal Merchants' Ass'n*, 85 F. Supp. 503, 508 (W.D. Mo. 1949). In this case, the paragraphs preceding count one and count one itself establish these elements.

15 U.S.C. § 1 provides that contracts, combinations and conspiracies in restraint of trade are illegal. Tracking the statutory language, paragraph 14 of the indictment charged that "the defendants and co-conspirators engaged in a combination and conspiracy in unreasonable restraint of trade and commerce" from July 1978, through February 1982. Rec. vol. I, doc. 1 at 7. Paragraph 9 of the indictment explains the sealed competitive bidding process used by the Oklahoma Department of Transportation and Oklahoma Turnpike Authority. *Id.* at 4-5. Highway

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Footnote continued—

> record a transcript of all evidence relevant to such finding or conclusion.

At the time the record was designated in this case, a general order established the procedure for designating a record in the Tenth Circuit. *See* In Re: Adoption of Procedures for Simplifying Designation and Transmission of Records on Appeal from the District Court (10th Cir. July 17, 1985) (unpublished order). Although the order sought to reduce the designation of unnecessary materials, it retained the time-honored rule that "[a]ppeals will be heard on the record." *Id.* § IV(f).

construction contracts are awarded to the lowest responsible bidder following the opening of sealed bids. *Id.* Paragraph 15 of the indictment charges that a substantial term of the conspiracy "was to submit collusive, noncompetitive, and rigged bids to, or withhold bids from, the Oklahoma Department of Transportation and the Oklahoma Turnpike Authority for the award of highway construction projects in Oklahoma." *Id.* at 7. Paragraph 16 outlines the practices in furtherance of the conspiracy allegedly engaged in by the appellants and other conspirators including 1) discussing the submission of prospective bids on projects, 2) agreeing on the successful low bidder on projects, 3) submitting intentionally high, noncompetitive bids or withholding bids on construction projects and 4) submitting bid proposals with false statements and entries. *Id.* at 8. Paragraph 17 spells out the anticompetitive effects of the conspiracy, primarily the lessening of price competition.

The indictment charges the appellants with a bid-rigging conspiracy in the award of highway projects during a 43-month period, from July 1978 through February 1982. Thus, the time element is satisfied. The conspiracy is alleged to have existed in the Western District of Oklahoma. Rec. vol. I, doc. 1 at 9. Thus, the place element is satisfied. The indictment specifies the manner and means of the conspiracy. There was advance agreement as to which co-conspirator would be the low bidder on highway construction projects. With this object in mind, some noncompetitive bids were submitted, and some bids were withheld. The indictment also specified the effect of this practice, a lessening of price competition in the highway construction industry. This indictment has "more factual detail" than the brief indictment in *United States v. Cecil,* 608 F.2d 1294 (9th Cir. 1979) (per

curiam), relied on by appellants. *See United States v. Miller,* 771 F.2d 1219, 1227 (9th Cir. 1985) (rejecting application of *Cecil* to a Sherman Act indictment).

Three weeks after the indictment, the government came forward and filed a bill of particulars listing eleven highway construction projects, twelve companies, and sixteen persons which the government claimed were part of the conspiracy. Thereafter, the government amended its bill of particulars by listing six highway construction projects involving the appellants directly and three others involving other co-conspirators. The indictment supplemented by the bill of particulars certainly put the defendants on notice of the charges against them. *United States v. Bi-Co Pavers, Inc.,* 741 F.2d 730, 734-35 (5th Cir. 1984) (highway bid rigging indictment specifying one project sufficient). Of course, it would have been preferable for the information in the bill of particulars to have been contained in the indictment as it apparently was in the sister case of *United States v. Washita Constr. Co.,* 789 F.2d 809 (10th Cir. 1986). But this circuit has never held that a failure of an indictment to list specific transactions or name all co-conspirators renders an antitrust indictment invalid.

To the contrary, in *United States v. Armour & Co.,* 137 F.2d 269, 271 (10th Cir. 1943), the court held an indictment sufficient which charged a conspiracy to fix prices of hogs in the Oklahoma City market even though the dates of particular transactions or the names of the actors were not contained in the indictment. The indictment charged the offense and merely detailed the elements or the means by which the conspiracy to restrain trade operated. *Id.* at 271, 272 (Phillips, J., concurring). Likewise, in *Frankfort Distilleries v. United States,* 144 F.2d

824, 832 (10th Cir. 1944) (en banc), *rev'd on other grounds*, 324 U.S. 293 (1945), the court considered two Sherman Act indictments with multiple defendants. The cases concerned an alleged conspiracy to fix retail liquor prices and another to monopolize the retail grocery trade. In upholding the general nature of the indictments, the court commented that the indictments did not list: 1) the specific products involved, 2) the producers, wholesalers, and retailers affected, nor 3) the persons involved in the conspiracies. But that did not affect the sufficiency of the indictments:

> [T]hese indictments each charge in general terms a conspiracy to restrain interstate trade and commerce, or monopolize such trade and commerce, as the case may be, substantially in the language of the Act. And if the allegations in respect to the manner and means of effecting the object of the combination and conspiracy are not set forth in sufficient detail, the remedy is to apply for a bill of particulars.

Id. at 832. The Tenth Circuit relied on *Glasser v. United States*, 315 U.S. 60 (1942), in which the Court restated that a conspiracy indictment must state a common intent, but that "[t]he particularity of time, place, circumstances, causes, etc., in stating the manner and means of effecting the object of the conspiracy . . . is not essential to an indictment." *Id.* at 66. For that type of specificity, a bill of particulars may be sought. *Id.* The Supreme Court has emphasized repeatedly that the test of the sufficiency of an indictment is *not* whether it could be more definite and certain, for that is the function of a bill of particulars. *United States v. Debrow*, 346 U.S. 374, 378 (1953); *Rosen v. United States*, 161 U.S. 29, 34 (1896); *Cochran and Sayre v. United States*, 157 U.S. 286, 290 (1895) ("Few

indictments . . . are so skilfully drawn as to be beyond the hypercriticism of astute counsel—few which might not be made more definite by additional allegations.").

The indictment in this case contains the elements necessary to allege an antitrust violation. In *Metropolitan Enter., Inc.*, 728 F.2d at 452-53, we considered a similar indictment charging bid rigging on highway projects in Oklahoma and found that the indictment contained the necessary elements. It is the presence of the necessary elements which determines the sufficiency of the indictment. The essence of a § 1 Sherman Act violation is a combination and conspiracy in restraint of trade. *Eastern States Lumber Ass'n v. United States*, 234 U.S. 600, 609 (1914). The combination and conspiracy is prohibited without regard to the success or failure of the concerted activity. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 225 n.59 (1940). Overt acts need not be alleged. *Nash v. United States*, 229 U.S. 373, 378 (1913); *Miller*, 771 F.2d at 1226. The bill of particulars served to "offset a lack of factual specificity."[4] Given the substantive law in this area, the mere furnishing of a bill of particulars in no way means the indictment was insufficient.

The appellants liken this case to *Russell v. United States*, 369 U.S. 749 (1962); however, the offense involved in this case is far different. In this case, we are dealing with a per se antitrust violation against a backdrop of established law for evaluating the sufficiency of antitrust

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4. If an indictment or information does not state all of the essential elements, it cannot be cured by a bill of particulars that alleges facts establishing the missing element. The bill may offset a lack of factual specificity, but it will not save an indictment so vague that it fails completely to charge an offense.

W. LaFave & J. Israel, *Criminal Procedure* § 19.2(f) (1984).

violations. *Russell* involved 2 U.S.C. § 192, which concerns the refusal by a congressional witness "to answer any question pertinent to the question under inquiry." The indictments in *Russell* did not identify the "question under inquiry," the subject under congressional inquiry. *Russell*, 369 U.S. at 752. This impeded the defense because a witness may refuse to answer questions which are not pertinent to the subject matter under inquiry. *Id.* at 755. After an exhaustive discussion of the substantive criminal law involved, the Court stated:

> As has been pointed out, the very core of criminality under 2 U.S.C. § 192 is pertinency to the subject matter under inquiry of the questions which the defendant refused to answer. What the subject matter actually was, therefore, is central to every prosecution under the statute. Where guilt depends so crucially upon such a specific identification of fact, our cases have uniformly held that an indictment must do more than simply repeat the language of the criminal statute.

Id. at 764. The failure to specify the subject matter would force a defendant "to go to trial with the chief issue undefined." *Id.* at 766.

The indictment in this case is light years away from the indictment in *Russell*. As noted, the core of criminality under § 1 of the Sherman Act is conspiracy in restraint of trade. The indictment alleges a per se violation of the Sherman Act, namely a bid-rigging conspiracy concerning public highway construction. The government contended that the conspiracy was self-perpetuating and could be plugged into at any time by the participants. *See United States v. Beachner Constr. Co.*, 729 F.2d 1278, 1283 (10th Cir. 1984) (the ability to rig bids due to "a

tacit understanding based upon a long course of conduct" constitutes a single conspiracy in violation of § 1). The indictment does more than merely repeat the words of the statute; it describes this particular conspiracy. Unlike *Russell*, the chief issue in the first count of the indictment was clearly defined.

The fact that various highway projects were not listed in the indictment does not render it invalid. "[I]t is well settled that conspiracies under the Sherman Act are not dependent on any overt act other than the act of conspiring." *Socony-Vacuum Oil Co.*, 310 U.S. at 225 n.59. Thus, overt acts of the conspiracy in restraint of trade need not be specified in the indictment. Appellants assert that the time period covered in the indictment involved the awarding of over 700 projects by the Oklahoma Department of Transportation. Rec. vol. I, doc. 44 at 3. Even accepting this information, the identification of which projects were alleged to be a direct part of the conspiracy involving defendants was the function of a bill of particulars. In *United States v. Fishbach and Moore, Inc.*, 576 F. Supp. 1384, 1388 (W.D. Pa. 1983), the defendant electrical contractors sought a bill of particulars specifying which of 150 electrical projects over a seven-year period were allegedly subject to a bid-rigging scheme. The government contended that individual projects were not relevant and that all bids during the period were the subject of the indictment. *Id.* After considering the nature of a Sherman Act conspiracy and the requirements of a sufficient indictment as stated in *Russell*, the district court required a bill of particulars to allow the defendants to better prepare for trial. *Id.* at 1389. Likewise, in *United States v. Campbell Hardware*, 470 F. Supp. 430, 433-34 (D. Mass. 1979), the district court recognized that great factual specificity is not required in Sherman Act indict-

ments and declined to dismiss the indictment. A bill of particulars was the proper avenue for greater factual detail. *Id.*

In this case, the government voluntarily came forward with a bill of particulars and an amended bill of particulars specifying particular projects, companies and persons thought to be directly involved. It cannot be said that the appellants were unable to prepare a defense given the indictment; indeed, appellants do not so contend on appeal.

Nor does *Russell* support an argument that the indictment contravenes the fifth amendment by not assuring that appellants were convicted only upon facts found by the grand jury. Again, this argument misapprehends the nature of indictment in *Russell*. In *Russell*, the Court was insistent that an indictment under 18 U.S.C. § 192 "state the question under . . . inquiry as found by the grand jury." *Russell*, 369 U.S. at 771. The Court stated:

> A grand jury . . . must necessarily determine what the question under inquiry was. To allow the prosecutor, or the court, to make a subsequent guess as to what was in the minds of the grand jury at the time they returned the indictment would deprive the defendant of a basic protection which the guaranty of the intervention of a grand jury was designed to secure. For a defendant could then be convicted on the basis of facts not found by, and perhaps not even presented to, the grand jury which indicted him.

Id. at 770. This oft-quoted language read in context admits of no more than the requirement that an indictment must contain the essential elements of the offense as determined by the grand jury. In *Russell*, the indictments

did not contain an essential element of the offense because they did not state the subject under congressional inquiry. The grand jury was required to make a determination of the subject under inquiry. *Id.* Thus, a grand jury must find all essential elements of the offense and recite these elements in the indictment.

All of the essential elements of a Sherman Act violation were contained in this indictment. The indictment did more than track the statutory language;[5] it described a conspiracy in restraint of trade. Although we cannot say whether each project relied upon by the government was presented to the grand jury, there simply is no requirement that every factual detail of a charge be presented to a grand jury. The government is not so limited in its proof. Here, the grand jury found elements of a bid-rigging conspiracy involving the appellants. The indictment notified the appellants of the charge. Greater factual specificity was acceptably provided by the bill of particulars.

Violation of the Speedy Trial Act

The Speedy Trial Act, 18 U.S.C. §§ 3161-3174 (1982 & Supp. II 1984) (the Act), requires that a defendant charged by indictment must be brought to trial within seventy days of the date the indictment is filed or the date the defendant first appears before a judicial officer of the court, whichever occurs later. *Id.* § 3161(c)(1). However, section 3161(h) provides for the exclusion of

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5. An indictment which merely tracks the statutory language may well be sufficient provided the statute contains all the essential elements of the crime. *Hamling*, 418 U.S. at 117; *United States v. Zavala*, 839 F.2d 523, 526 (9th Cir.) (per curiam), *cert. denied*, 109 S. Ct. 86 (1988).

certain periods of delay in the calculation of the seventy-day term. Four types of delay, each treated by a distinct subsection of section 3161(h), are at issue in this appeal. In addition, various other provisions of the Act are implicated by the course of proceedings prior to trial.

The appellants argue that the trial court erred in granting a continuance in the prosecution of Mr. Philpot under section 3161(h)(8)(A).[6] They do not dispute that some period of delay was proper while the government appealed the dismissal of all charges against the Corporation. However, the appellants maintain that only the application of section 3161(h)(1)(E)[7] coupled with section 3161(h)(7)[8] could stay the entire prosecution, and that not even the force of these provisions was sufficient to halt the proceedings for the period of delay actually incurred. The sum of the appellants' claim is that all

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6. Section 3161(h)(8)(A) excludes

> [a]ny period of delay resulting from a continuance granted by any judge on his own motion or at the request of the defendant or his counsel or at the request of the attorney for the Government, if the judge granted such continuance on the basis of his findings that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial. No such period of delay resulting from a continuance granted by the court in accordance with this paragraph shall be excludable under this subsection unless the court sets forth, in the record of the case, either orally or in writing, its reasons for finding that the ends of justice served by the granting of such continuance outweigh the best interests of the public and the defendant in a speedy trial.

7. Section 3161(h)(1)(E) requires the court to exclude "any period of delay resulting from other proceedings concerning the defendant, including but not limited to . . . delay resulting from any interlocutory appeal."

8. Section 3161(h)(7) requires the court to exclude "[a] reasonable period of delay when the defendant is joined for trial with a codefendant as to whom the time for trial has not run and no motion for severance has been granted."

charges in the indictment must be dismissed[9] because the government failed to bring them to trial within the time allowed by section 3161(c)(1). By the appellants' calculations, the last possible date on which either the Corporation or Mr. Philpot could have been brought to trial was February 17, 1986, two weeks before the jury in the case was actually empanelled.[10]

The appellants are correct in their assertion that sections 3161(h)(1)(E) and (h)(7), not section 3161(h)(8)(A), governed the exclusion of certain periods of delay incurred in the prosecution of this case.[11] Section 3161(h)(1)(E) tolled the speedy trial clock of the Corporation while the government's interlocutory appeal was before this court. Similarly, section 3161(h)(7) excluded several "reasonable" periods of delay that punctuated the prosecution of Mr. Philpot. Our conclusion on this point follows directly from our holding in *United States v. Theron*, 782 F.2d 1510 (10th Cir. 1986), a decision announced fifteen months after the district court granted the continuance in this case.

The appellant in *Theron* was one of twelve co-defendants indicted for conspiracy and mail fraud. When released on bail, ten of Mr. Theron's co-defendants moved

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9. Section 3162(a)(2) provides: "If a defendant is not brought to trial within the time limit required by section 3161(c) as extended by section 3161(h), the . . . indictment shall be dismissed on motion of the defendant."

10. "The date that trial commences for the purposes of the Speedy Trial Act is the date that a jury is selected." *United States v. Scalf*, 760 F.2d 1057, 1059 (10th Cir. 1985) (citing *United States v. Martinez*, 749 F.2d 601, 604 (10th Cir. 1984)).

11. Therefore we do not address the appellants' alternate argument that even if the trial court were correct in applying section 3161(h)(8), the seventy-day period in the prosecution of Mr. Philpot lapsed six weeks before trial actually began.

for an "ends of justice" continuance under section 3161 (h) (8) of the Speedy Trial Act due to the complexity of the case. Mr. Theron, who remained in custody, opposed the motion and filed his own motion under the Act to demand an immediate trial or dismissal of his indictment. The district court granted the co-defendants' motion for continuance but denied Mr. Theron's motion for trial or dismissal. Mr. Theron then sought a writ of mandamus from this court ordering the trial judge to begin trial or dismiss his indictment.[12]

In reviewing Mr. Theron's claims, our examination of the text and the legislative history of the Speedy Trial Act led us to conclude that the district court had abused its discretion in granting a continuance under section 3161 (h) (8).

> It appears that the trial court relied upon three factors to justify the continuance: (1) the codefendants' need for preparation time; (2) the complexity of the case; and (3) the desirability of trying all defendants at once. In the context of this case these are either improper or insufficient factors to justify an ends-of-justice continuance under § 3161 (h) (8).

Theron, 782 F.2d at 1512-13. With one addition,[13] these are precisely the factors cited by the district court in this case for granting the government a continuance under section 3161 (h) (8). *See* rec. vol. I, doc. 49.

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12. Subsequently, Mr. Theron filed a motion for severance and release pending trial; that motion was also denied. An appeal of that ruling was consolidated with Mr. Theron's request for the writ of mandamus.

13. The fourth factor was a conflict in scheduled trial dates the government would incur if the continuance were not granted.

In *Theron*, we noted that "[s]ubsection (h)(7) treats exclusion of time because codefendants are in the case, not subsection (h)(8)." *Id.* at 1513. Thus we concluded that "holding that a complex multiple defendant case is enough to toll the Act under subsection (h)(8) would emasculate the specific separate provision in subsection (h)(7) . . . ." *Id.* Broadening this statement only slightly for the purposes of this case, we conclude that the misapplication of section 3161(h)(8) will undermine not only section (h)(7), but also section 3161(h)(1)(E).

Choosing the correct statutory provisions to regulate the periods of delay in this prosecution only begins the task before us. We still must examine the effects of these provisions to determine whether the appellants' conclusion, that all charges against them must be dismissed, is warranted. A temporary split in the appellants' joint trial proceedings occurred when the government filed an interlocutory appeal from the dismissal of charges against the Corporation and simultaneously moved for a continuance in the prosecution of Mr. Philpot during the pendency of the appeal. As a result, the legal consequences of the delay in the prosecution of the Corporation may appear unrelated to those arising from the delay in the pretrial proceedings against Mr. Philpot. But, in fact, the operation of the Act upon the prosecution of the Corporation determines the effect of delay on the government's case against Mr. Philpot.

The internal workings of the Act as applied to this case are complex. For the sake of clarity in the exposition of our analysis, we will address the application of the Act to the Corporation separately from its application to Mr. Philpot. We begin with the Corporation.

The appellants were arraigned on August 22, 1984, the same day the grand jury returned its indictment. The seventy-day period began to run for the Corporation the following day, August 23, 1984. *United States v. Richmond,* 735 F.2d 208 (6th Cir. 1984); *United States v. Campbell,* 706 F.2d 1138, 1139 (11th Cir. 1983). From that date until October 9, 1984, the day the district court dismissed all charges against the Corporation,[14] forty-seven days elapsed. However, due to the filing of pretrial motions in the case, all but seven days of this period are excludable under section 3161(h)(1)(F).[15] From October 10 to November 5, 1984, the period following the dismissal but preceding the government's appeal under 18 U.S.C. § 3731, twenty-six nonexcludable days elapsed. Thus, a total of thirty-three days passed before jurisdiction over the Corporation was withdrawn from the district court. The appeal was under the jurisdiction of this court from November 6, 1984, when the government filed its notice of appeal, until December 9, 1985, when we issued our mandate to the district court. This entire 398-day period is excludable under section 3161(h)(1)(E).

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14. The government states that the district court's order dismissing all charges against the Corporation (and Partnership) was entered on November 19, 1984, the same day the court granted the government's motion for a continuance in the prosecution of Mr. Philpot. *See* Brief of Appellee at 13. This is incorrect; the order was entered October 9, 1984. *See* rec. vol. I, doc. 37. The error renders the government's calculations of excludable time inaccurate. *See* Brief of Appellee at 13, 19.

15. This section states:

> (1) Any delay resulting from other proceedings concerning the defendant, including but not limited to—
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> . . . .
>
> (F) delay resulting from any pre-trial motion, from the filing of the motion through the conclusion of the hearing on, or the prompt disposition of, such motion . . . .

Upon our remand of the case to the district court, the government acquired an additional seventy days in which to bring the Corporation to trial.[16] This period began December 10, 1985, the day after our mandate issued. By January 8, 1986, thirty days of the period had passed without any advance in the prosecution of the appellants. None of this time is excludable under the Act. On January 9, 1986, the district court held a pretrial status conference attended by Mr. Philpot and counsel representing both Mr. Philpot and the Corporation. At the conference, the government asked to submit an amended bill of particulars while the appellants requested time in which to submit additional pretrial motions. The court allowed the appellants fifteen days (until January 24, 1986) to file their motions and granted the government an additional ten days (until February 3, 1986) in which to respond. Joint Docketing Statement at 2-3. The status conference was "a proceeding concerning the defendant"; January 9 is therefore excludable under section 3161

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16. Section 3161(d)(2) provides in part:

> If the defendant is to be tried upon an indictment or information dismissed by the trial court and reinstated following an appeal, the trial court shall commence within seventy days from the date the action occasioning the trial becomes final, except that the court retrying the case may extend the period for trial not to exceed one hundred and eighty days from the date the action occasioning the trial becomes final if the unavailability of witnesses or other factors resulting from the passage of time shall make trial within seventy days impractical.

In *United States v. Scalf*, 760 F.2d 1057, 1059 (10th Cir. 1985), we defined "the date the action occasioning the retrial becomes final" in section 3161(e) as the date the mandate issues from the court of appeals to the trial court. The reason for this is straightforward. Prior to that date, the court of appeals retains control of the judgment; the appellants may request a rehearing or the court may decide to rehear the case en banc. Once the mandate issues, however, the trial court regains jurisdiction over the case. The same definition applies to the phrase where it appears in section 3161(d)(2).

(h)(1). The question remains, however, whether all or even part of the twenty-five day period from January 10 until February 3, 1986, is excludable under that same section or any other provision of the Speedy Trial Act. Had the appellants submitted motions on January 9, the running of the seventy-day period would have been tolled for a period prescribed by section 3161(h)(1)(F). But on that date the appellants (and the government) merely expressed the intent to file additional documents; nothing was submitted to the court.

Section 3161(h)(1) does not specify the entire set of "proceedings concerning the defendant" that will result in excludable periods of delay. To the contrary, its introductory language states that delay may result from proceedings "including, but not limited to," those found in subsections 3161(h)(1)(A) through (h)(1)(J). Moreover, the Senate Report on the 1979 Amendments to the Act declares that "[t]he list [of proceedings concerning the defendant] is not intended to be exhaustive. It is representative of procedures of which a defendant might ligitimately [sic] seek to take advantage for the purpose of pursuing his defense." S. Rep. No. 212, 96th Cong., 1st Sess. 10 (1979).

The open-ended construction of section 3161(h)(1) and the invitation implicit in the legislative history of the Act cannot be ignored. We believe that a permissible addition to the list of proceedings that automatically toll the speedy trial clock would be a grant of time by the district court—in response to a written or oral request by the defendant—for the preparation of written pretrial motions.[17] Such a grant of time un-

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17. Whether a grant of time to the government for preparation of a written motion ought to be excluded when the

(Continued on following page)

doubtedly allows the accused to better pursue a defense and is therefore consistent with the objective of section 3161(h)(1). But it serves another salutary purpose as well. The grant allows the district court to dispose of the difficult question of whether the defendant's interests are better served by an uninterrupted march to trial or by a pause in proceedings at the defendant's request for the preparation of pretrial motions. Because our addition to section 3161(h)(1) automatically suspends the seventy-day period, the burden of answering that crucial question lies with the defendant, the one best acquainted with the defensive strategy opposing the government's case. The defendant may either submit to the expeditious prosecution contemplated by the Act or elect to postpone his trial briefly to better formulate a defense; the choice remains entirely his. An additional benefit of removing the "burden of choice" from the court in this situation is that it precludes a later charge by the defendant that the court entered an arbitrary pretrial procedural ruling that prejudiced his ability to prepare his defense properly.

Our determination on this point does not ignore the Senate Judiciary Committee's reservations about enlarging the period automatically excluded by pretrial motions practice. Addressing changes in the computation of excludable delay under the 1979 amendments to section 3161(h)(8), the Committee noted that even though "some

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Footnote continued—

government initiates the request for delay is a question we do not decide in this appeal. However, we recognize that when the district court carves out a block of time to accommodate the defendant's request to submit pretrial motions, that period must necessarily include as an excludable increment a reasonable time for the government to respond to the defendant's submissions.

witnesses contended that all time consumed by motions practice, from preparation through their disposition, should be excluded, the Committee finds that approach unreasonable. This is primarily because, in routine cases, preparation time should not be excluded where the questions of law are not novel and the issues of fact simple." S. Rep. No. 96-212, 96th Cong., 1st Sess. 33-34.[18] The Committee also urged the courts to exercise caution in granting an "ends of justice" continuance under section 3161(h)(8) of the revised statute to accommodate pretrial motions only "because it will be quite difficult to determine a point at which preparation actually begins." *Id.* at 34.

We note that, as enacted following the 1979 amendments, section 3161(h)(8)(B) tempers the stern tone of the Committee Report regarding the circumstances under which an "ends of justice" continuance may be granted. Subsection 3161(h)(8)(B)(ii) permits a continuance, even in the absence of an unusual or complex case or novel questions of fact or law, when a failure to grant one "would deny counsel for the defendant or the attorney for the government the reasonable time necessary for effective preparation, taking into account the exercise of due diligence."

Moreover, under our modest expansion of the list of tolling proceedings, there can be no question about when preparation of pretrial motions actually begins. Routine drafting of a motion, unknown to the court until the document is filed, simply does not toll the speedy trial

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18. The Committee "would permit through its amendments to subsection (h)(8)(B) reasonable preparation time for pretrial motions in cases presenting novel questions of law or complex facts." S. Rep. No. 96-212, 96th Cong., 1st Sess. 34.

period. Either the trial judge accedes to a specific request for preparation or the trial date moves inexorably closer. The court need never fear the appearance of the defendant on the eve of trial, in an invitation to the government to postpone his prosecution, claiming that his preparation of pretrial motions began the moment after indictment.[19]

Having constructed our rule, we now apply it to the case at hand. The period from January 10 to February 3, 1986, was expressly allocated by the district court in part to the defendants for drafting pretrial motions and in part to the government for filing its response. We hold that that entire span of time is excluded from the seventy-day period by section 3161(h)(1).

The remainder of the interval between the Corporation's arraignment and trial is easily accounted for. From February 4 to February 20, 1986, seventeen days elapsed, none of which are excludable. On February 21, the appellants filed their Motion to Dismiss for Violation of the Speedy Trial Act. The motion was taken under advisement by the court and denied on February 27. This seven-day period is excludable under section 3161(h)(1)(F). Finally, the three days from February 28 to March 2 are not excludable. Thus only fifty non-excludable days elapsed in the entire prosecution of the Corporation, a total well within the limit prescribed by section 3161(c)(1). Finding no Speedy Trial Act violation in this segment of the case, we turn now to the

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19. In expanding the list of proceedings concerning the defendant as we have, we would point out that ours is not the first circuit to do so. *See United States v. Jodoin*, 672 F.2d 232, 238 (1st Cir. 1982); *United States v. Tibboel*, 753 F.2d 608, 610 (7th Cir. 1985); *United States v. Wilson*, 835 F.2d 1440, 1444 (D.C. Cir. 1987).

period of delay associated with the prosecution of Mr. Philpot.

As explained above, the period in which the government's interlocutory appeal resided in this court from October 6, 1984, to December 9, 1985, was excludable under section 3161(h)(1)(E). We have established that the exclusion applied to the seventy-day account of the Corporation, a party to the interlocutory appeal. However, the issue remaining for us to resolve is the extent to which this exclusion and others incurred in the prosecution of the Corporation applied to Mr. Philpot, the Corporation's co-defendant under the indictment.

Section 3161(h)(7) authorizes an exclusion for "[a] reasonable period of delay when the defendant is joined for trial with a co-defendant as to whom the time for trial has not yet run and no motion for severance has been granted." In *United States v. Theron*, 782 F.2d 1510, 1514 (10th Cir. 1986), we stated that "[t]he obvious purpose behind the [section 3161(h)(7)] exclusion is to accommodate the efficient use of prosecutorial and judicial resources in trying multiple defendants in a single trial." We further noted that to satisfy this purpose, "the courts generally have held that *extensions sought by one codefendant toll the limitations period of all.*" *Id.* (emphasis added).

Indeed, every court of appeals that has construed section 3161(h)(7) in this context has concluded that an exclusion attributable to one defendant is applicable to all co-defendants. *See United States v. Rush*, 738 F.2d 497, 504 (1st Cir. 1984), *cert. denied*, 470 U.S. 1004 (1985); *United States v. McGrath*, 613 F.2d 361, 366 (2d Cir. 1979), *cert. denied*, 466 U.S. 967 (1980); *United States v. Novak*, 715 F.2d 810, 815 (3d Cir. 1983), *cert. denied*,

465 U.S. 1030 (1984); *United States v. Holyfield*, 802 F.2d 846, 848 (6th Cir. 1986), *cert. denied*, 107 S. Ct. 1298 (1987); *United States v. Fogarty*, 692 F.2d 542, 546 (8th Cir. 1982), *cert. denied*, 460 U.S. 1040 (1983); *United States v. Van Brandy*, 726 F.2d 548, 551 (9th Cir.), *cert. denied*, 469 U.S. 839 (1984); *United States v. Struyf*, 701 F.2d 875, 878 (11th Cir. 1983); *United States v. Edwards*, 627 F.2d 460, 461 (D.C. Cir.), *cert. denied*, 449 U.S. 872 (1980). The *Guidelines to the Administration of the Speedy Trial Act* (Guidelines) promulgated by the Judicial Conference of the United States have also endorsed this position. *See* Guidelines, Issuance #36 (Nov. 10, 1984), at 57-58. We now adopt this interpretation and hold that, subject to a "reasonableness" limitation, an exclusion under section 3161(h)(1) attributable to one defendant is applicable to all co-defendants under section 3161(h)(7).

The appellants inform us that their review of the case law has not disclosed any precedent in which a delay of 398 days (the period from the first notice of appeal to the issuance of our mandate) has been found reasonable. We respond by pointing out that in deciding whether a period of delay is reasonable, it is essential to measure dimensions other than length. In *Theron*, we recognized that only a multi-faceted inquiry is proper when we stated that "[i]n determining reasonableness of the period excluded, *all relevant circumstances* must be considered." *Theron*, 782 F.2d at 1514 (emphasis added).

The first guidepost in our attempt to determine reasonableness must be the legislative history of the Speedy Trial Act. In 1974 the Senate Judiciary Committee explained the function of section 3161(h)(7):

> The purpose of the provision is to make sure that S. 754 does not alter the present rules of severance of codefendants by forcing the Government to prosecute the first defendant separately or to be subject to a speedy trial dismissal motion under section 3162.

S. Rep. No. 93-1021, 93d Cong., 2d Sess. 38 (1974). Five years later, while considering amendments to the Act, the Committee addressed arguments for enlarging the time in which a defendant must be brought to trial.

> The observation has been made that the rigidity of the time limit will force the courts to disregard the principle of "judicial efficiency." Defendants who are properly charged with the joint commission of an offense should ordinarily be tried together to save time, expense and inconvenience of separate prosecutions. It has been reported that some trial judges have granted severances unnecessarily in multidefendant cases "so that a defendant whose case is moving slowly does not hold up the trial of his codefendants." In its own study the Department [of Justice] studied 180 multidefendant cases. It found no reflection of the occurrence of such incidents. Nor is there an indication of any such occurrence in the data compiled by the Administrative Office. If the Act has been so interpreted to require such a result, the Committee calls to the Senate's attention § 3161 (h)(7), which provides specifically for exclusion of "a reasonable period of delay when the defendant is joined for trial with a codefendant as to whom time for trial has not yet run."

S. Rep. No. 96-212, 96th Cong., 1st Sess. 24-25 (1979).

The Committee's remarks support our statement in *Theron* that in the application of the "reasonableness"

standard under section 3161(h)(7), judicial efficiency in the trial of multiple defendants is to be preferred to an inflexible adherence to the letter of the Speedy Trial Act. *Theron*, 782 F.2d at 1514. A more forceful yet equally valid expression of the point is the Eleventh Circuit's blunt comment that "[Congress] felt that the efficiency and economy of joint trials far outweighed the desirability of granting a severance where the criterion was simply the passage of time." *United States v. Campbell*, 706 F.2d 1138, 1142 (11th Cir. 1983).

We agree that "[w]hether the delay was reasonable will depend on the facts of each case." *United States v. Dennis*, 737 F.2d 617, 621 (7th Cir.), *cert. denied*, 469 U.S. 868 (1984). Thus we must also ask whether the factual setting of this case dictates that it is reasonable to delay the trial of one defendant, Mr. Philpot, considering not only judicial economy but also procedural fairness to Mr. Philpot and the Corporation. To answer this question, we examine the role Mr. Philpot plays in the prosecution of the case and his status while awaiting trial.

The opening paragraphs of the indictment identify the three defendants as Mobile Materials, Inc., a corporation, Mobile Materials Company, a partnership, and Mr. Gerald O. Philpot, the president of the Corporation and the managing partner and president of the Partnership. These paragraphs disclose that Mr. Philpot is not only a principal defendant in the prosecution, he is also inextricably caught up in the business affairs of his co-defendants. The indictment also states that when reference is made to an act of either the Corporation or the Partnership, "the allegation shall be deemed to mean the "act . . . [of] its *officers, directors, partners*, agents,

employees or representatives." Record, doc. 1, at 3 (emphasis added). Moreover, Mr. Philpot is named as a defendant in all seven counts of the indictment, in league with the Corporation (in counts two and three) or with both the Corporation and the Partnership (in counts one, four, five, six, and seven).

Whether the government's case unfolds in a single trial with multiple defendants or in a separate proceeding for each defendant, certain aspects of the prosecution remain constant: the government will recite a single factual history, put on a single array of evidence, and call a single group of witnesses. But most important to our inquiry here, whichever path the judicial process follows, the government will point to Mr. Philpot as a principal actor in every one of the allegedly illegal transactions it seeks to prosecute. These facts alone favor a delay in the prosecution of Mr. Philpot sufficient to allow a joint trial of all the defendants, *United States v. Sutton*, 801 F.2d 1346, 1365 (D.C. Cir. 1986), but there are more facts to consider.

In our determination, we cannot ignore that prior to trial, including the lengthy period of the interlocutory appeal, Mr. Philpot was free on bond. In *Theron*, we commented that other "[c]ourts have excluded *extended periods of delay* when all defendants are out on bail." *Theron*, 782 F.2d at 1514 (emphasis added) (citing *United States v. DeLuna*, 763 F.2d 897, 922-23 (8th Cir.), *cert. denied*, 474 U.S. 980 (1985)); *accord United States v. Campbell*, 706 F.2d 1138, 1142 (11th Cir. 1983); *United States v. Edwards*, 627 F.2d 460, 461 (D.C. Cir.), *cert. denied*, 449 U.S. 872 (1980).

Nor can we overlook the fact that throughout the protracted history of this prosecution Mr. Philpot has

never filed a motion for severance under Rule 14 of the Federal Rules of Criminal Procedure. *See* Appellants' Reply Brief at 18; *cf. Theron*, 782 F.2d at 1512. Normally, a motion for severance will adequately focus attention upon and allow the district court to relieve unfairness created by delay in favor of a joint trial.

In view of Mr. Philpot's prominent position in the Corporation and the Partnership, his essential participation in all trial proceedings, and his release on bail during trial, we find that the facts of this case argue persuasively for a delay in the prosecution of Mr. Philpot to allow a joint trial with his codefendants.

Finally, in determining the bounds of "a reasonable period," we consult the *Guidelines to the Administration of the Speedy Trial Act, supra.* The Guidelines recommend that in the situation we face here, a period of time excluded under section 3161(h)(7) has the following starting and ending dates:

> *Starting Date* In the situation in which the (h)(7) exclusion is based on an exclusion applicable to a codefendant, the starting date is the starting date of the codefendant's exclusion.
>
> *Ending Date* In the situation in which the (h)(7) exclusion is based on an exclusion applicable to a codefendant, the ending date is the ending date of the codefendant's exclusion.

Guidelines at 58-59.

While the Guidelines are not binding on this court,[20] the formula they offer would allow us to avoid sever-

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20. The Guidelines are not binding interpretations of the Speedy Trial Act; they are intended only to advise the federal courts. *See* Guidelines at i.

ance forced merely by the passage of time. As we have noted, this result is consistent with the purpose of section 3161(h)(7) as indicated by its legislative history and with the holdings of the courts of appeals that have extended the exclusion due to one defendant's delay to all co-defendants. It is also consistent with the goal of the entire Act, which is to provide certainty and fairness for defendants. *See United States v. Campbell*, 706 F.2d at 1143.

We conclude that a delay in the prosecution of Mr. Philpot sufficient to allow his joint trial with his co-defendants is reasonable under section 3161(h)(7). Our method of reaching this result is not one of mathematical calculation, but one that considers the purpose of the Speedy Trial Act, the facts of the case, the status of the defendant, and the recommendations of the Guidelines to the Administration of the Speedy Trial Act. As a result, we do not express section 3161(h)(7)'s "reasonable period" as a fixed span of time, the running of which forces dismissal of an indictment or the severance of a defendant. Rather, we declare that given the context of this case, the operation of section 3161(h)(7) has a twofold result: (1) a single speedy trial clock has been established to govern the timing of the prosecution of both the Corporation and Mr. Philpot, and (2) all excludable periods of delay attributable to the Corporation also apply to Mr. Philpot. Because no Speedy Trial Act violation occurred in the prosecution of the Corporation, none occurred in the synchronized prosecution of Mr. Philpot.

Allegations of Judicial Misconduct

The appellants' next argument takes issue with the trial judge's management of the case during trial and

during the jury's deliberations. Specifically, the appellants raise three objections: (1) the court's evidentiary rulings were prejudicial to Mr. Philpot's efforts to show that he was not connected to a conspiracy to rig bids, (2) the court interjected unsolicited comments into the trial process, and (3) the court's post-trial admonitions to the jury coerced a verdict adverse to the appellants. We are unable to review these points in the absence of a transcript containing the statements on which the appellants rely. As noted, the responsibility for a proper designation of record lies with the parties, here the appellants, not with the court of appeals. *United States v. Hart*, 729 F.2d 662, 671 (10th Cir. 1984), *cert. denied*, 469 U.S. 1161 (1985). Moreover, because trial counsel indicates that he failed to object concerning the third point, we are unable to make a plain error assessment in the absence of a complete record.

Severity of the Sentence Imposed

The appellants argue strenuously that the sentence imposed by the district court is grossly disproportionate to others given for conviction of the same crimes and that the sentence ignores the "individual circumstances" of both Mr. Philpot and the Corporation. The appellants point out that Mr. Philpot received the most severe monetary penalty allowed under section 1 of the Sherman Act and that his term of imprisonment is far in excess of the average sentence imposed for similar Sherman Act violations. In the appellants' view, the sentence is more appropriate for a ringleader of bid-rigging on a multi-state scale and stands as "a further indication of the trial court's antipathy toward these Appellants, which . . . permeated the trial itself." Appellants' Brief in

Chief at 46. With respect to the Corporation's sentence, the appellants tell us that the total fine of $510,000.00 is twenty percent greater than the net worth of Mobile Materials, Inc. when it was dissolved in 1982.

This court's most comprehensive statement on the prerogative of an appellate court to overturn a sentence was announced in *United States v. Espinoza,* 771 F.2d 1382 (10th Cir.), *cert. denied,* 474 U.S. 1023 (1985). In that case we explained

> that when a sentence is imposed within statutory limits, it is not ordinarily subject to appellate review. We will review the sentences only if the trial judge based them on "misinformation of constitutional magnitude" or failed to exercise any discretion in the sentencing process. Appellate review is appropriate "when a trial court fails to afford individual treatment, imposes a sentence mechanically, or refuses to consider all the mitigating circumstances." However "a sentencing judge has considerable discretion and leeway in determining, from the totality of the circumstances, the extent of the individual punishment to be meted out for each offense committed."

Id. at 1403 (citations omitted); *see also United States v. Brown,* 784 F.2d 1033, 1039-40 (10th Cir. 1986). Consistent with our holding in *Espinoza,* our examination of the sentencing phase of trial is limited to a review of the district court's exercise of discretion in meting out punishment.

The penalties imposed on Mr. Philpot for his bid rigging activity, both the three-year term of imprisonment and the $100,000 fine, are permitted under the

Sherman Act, 15 U.S.C. § 1. The penalties imposed on Mr. Philpot for his false and misleading statements, both the three-year term of imprisonment and the $10,000 fine, are permitted under the controlling federal statute, 18 U.S.C. § 1001. Precisely the same is true of the sanctions imposed upon the Corporation; they are contemplated by the same statutory provisions.

Peering behind the facial legality of the sentences, as urged by the appellants and permitted under the *Espinoza* standard, we look for evidence that the district court failed to temper its judgment with consideration for the circumstances of the appellants. The appellants have provided us with nothing pertaining to this case to convince us that the district court imposed sentence mechanically or failed to consider all the materials submitted in mitigation. Thus we conclude that the court remained within the bounds of the discretion allowed it when sentencing defendants. Its ruling is affirmed.

The judgment of the district court is AFFIRMED.

No. 86-1756 - UNITED STATES OF AMERICA v. MOBILE MATERIALS, INC. and GERALD O. PHILPOT

McKAY, Circuit Judge, dissenting:

I respectfully dissent.

Appellants contend that count one of the indictment returned by the grand jury was "constitutionally and procedurally defective" due to the vagueness of its language. The appellants maintain that the charging section of count one lacks sufficient detail to protect their rights to due process of law guaranteed by the Fifth and Sixth Amendments to the United States Constitution.[1]

Generally, three clauses of the Fifth Amendment are implicated by a claim that an indictment is unconstitutionally vague. The Amendment provides that "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment of indictment of a Grand Jury . . . nor shall any person be subject for the same offence to be twice put in jeopardy . . . nor be deprived of life, liberty, or property, without due process of law . . . ." Of equal relevance is the Sixth Amendment's guarantee that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation."

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1. The appellants offer only a cursory argument on this issue in their Brief in Chief. They refer us, however, to their Brief in Support of the Motion to Dismiss Count One for Vagueness, a document submitted to the district court and now included as part of the record before us. It is in the supporting brief that the appellants ground their objection to the language of count one in the guarantees of the Fifth and Sixth Amendments. Record, doc. 44, at 4-6.

In *Russell v. United States*, 369 U.S. 749 (1962), the Supreme Court observed that the process of grand jury indictment is designed to guarantee a defendant in a criminal prosecution the "substantial safeguards" of the Fifth and Sixth Amendments. Drawing on the Court's explication in *Russell*, we have held that

> [t]he purposes and requirements for the sufficiency of indictments have been variously stated, but the essentials are clear. First the indictment must contain the elements of the offense and sufficiently apprise the defendant of what he must be prepared to meet . . . . And a purpose corollary to the first is that the indictment inform the court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction, if one should be had. Furthermore, and of paramount importance, a sufficient indictment is required to implement the Fifth Amendment guaranty and make clear the charges so as to limit a defendant's jeopardy to offenses charged by a group of his fellow citizens, and to avoid his conviction on facts not found, or perhaps not even presented to, the grand jury that indicted him.

United States v. Radetsky, 535 F.2d 556, 562 (10th Cir. 1976) (citations omitted); *see United States v. Bohomus*, 628 F.2d 1167, 1173 (9th Cir. 1980). These requirements stand in conjunction with each other; all must be satisfied by the language of an indictment or the indictment is fatally defective.

Though the appellants address all of these requirements in their challenge to count one's sufficiency, their arguments focus on only two: "whether Count One as a whole conveys sufficient information to enable the

[appellants] to prepare for trial, and to identify the conduct relied upon *by the Grand Jury* in making the charge." Record, doc. 44, at 6.

When determining whether an indictment is drafted with enough detail to protect a defendant's constitutional rights of due process, we examine the entire document. *United States v. Metropolitan Enterprises, Inc.*, 728 F.2d 444, 453 (10th Cir. 1984). This rule applies when the entire indictment is challenged, or where, as here, the sufficiency of only part of the document is at issue. So in responding to the appellants' constitutional challenge to count one, we look first to the charging statement and related provisions of count one, then to the remaining paragraphs of that count, and finally to all "four corners" of the indictment for factual details that will support the government's allegations of collusive, anticompetitive conduct.

The charging statement in paragraphs fourteen, fifteen, and sixteen, the allegation of anticompetitive effects in paragraph seventeen, and the allegation of jurisdiction and venue in paragraph eighteen comprise the heart of count one. These paragraphs read in their entirety:

OFFENSE CHARGED

> 14. Beginning at least as early as July 1978, and continuing thereafter at least through February 1982, the exact dates being unknown to the Grand Jury, the defendants and co-conspirators engaged in a combination and conspiracy in unreasonable restraint of trade and commerce in violation of Section 1 of the Sherman Act (15 U.S.C. section 1).
>
> 15. The aforesaid combination and conspiracy consisted of an agreement, understanding, and concert

of action among the defendants and co-conspirators, a substantial term of which was to submit collusive, noncompetitive, and rigged bids to, or to withhold bids from, the Oklahoma Department of Transportation and the Oklahoma Turnpike Authority for the award of highway construction projects, some of which were federally funded.

16. For the purposes of forming and effectuating the aforesaid combination and conspiracy, the defendants and co-conspirators did those things which they combined to do, including:

(a) Discussing the submission of prospective bids on highway construction projects in Oklahoma;

(b) Agreeing upon the successful low bidder on highway construction projects in Oklahoma;

(c) Submitting intentionally high, noncompetitive bids, or withholding bids, on highway construction projects in Oklahoma; and

(d) Submitting bid proposals on highway construction projects in Oklahoma containing false, fictitious, and fraudulent statements and entries.

EFFECTS

17. The aforesaid combination and conspiracy had the following effects, among others:

(a) Prices for Oklahoma highway construction projects were fixed and established at artificial and noncompetitive levels;

(b) Competition for the award of Oklahoma highway construction projects was restrained, suppressed, and eliminated;

(c) The state of Oklahoma was denied the right to receive competitive bids for highway construction projects; and

(d) The State of Oklahoma and the United States of America were denied the benefits of free and open competition for the award of highway construction projects.

JURISDICTION AND VENUE

18. The aforesaid combination and conspiracy was formed and carried out, in part, within the Western District of Oklahoma within the five years preceding the return of this indictment.

Record, doc. 1, at 7-9.

As with the entire indictment challenged in *Russell*, the defect in the charging statement and its complementary provisions lies in their failure "to inform the defendant of the nature of the accusation," *Russell*, 369 U.S. at 767, by descending to the particulars of time, manner, and circumstance associated with the alleged offense. *See id.* at 765. Paragraph fourteen of the indictment merely sketches the antitrust violation charged by paraphrasing the language of section 1 of the Sherman Act. This derivative of statutory text ignores the rule in *Russell* that "where guilt depends so crucially upon a specific identification of fact . . . an indictment must do more than repeat the language of the criminal statute." *Id.* at 764. In addition, it leaves to the remaining sections of the charging statement the substantial task of bringing home to the appellants the facts of the alleged offense.

Paragraph fifteen builds upon the bare charge of unlawful concerted action found in paragraph fourteen.

It characterizes the alleged unlawful conduct as bid-rigging but in doing so achieves only two unremarkable results. It plucks the conduct of which the appellants are accused from the vast sea of acts illegal under section 1 of the Sherman Act and ties that conduct to the contract-letting procedures of the Oklahoma Department of Transportation. Given the meager substance of paragraph fourteen, the information supplied in paragraph fifteen is a necessary buttress to the charging statement. Yet the coupling of the two paragraphs does not sufficiently strengthen the definition of the antitrust charge to allow the appellants to prepare their defense.

Paragraph sixteen continues the government's flawed technique of charging collusive conduct. It lists four *types* of overt acts by which the government alleges the appellants advanced their bid-rigging conspiracy but fails to refine the allegations of the two preceding paragraphs. Its coarse parsing of conduct is simply unable to provide the specifications of time, place, and circumstance needed to tell the appellants which of their acts constitute the alleged offense.

Paragraphs seventeen and eighteen conclude the government's definition of the antitrust violation, but their content is inadequate to cure the infirmities of the charging statement. In paragraph seventeen the government claims that prices have been fixed, competition has been restrained, and that Oklahoma and the United States have been denied the benefits of free competition. But nowhere in the paragraph does the government tie these nebulous allegations to specific instances of criminal wrongdoing by the appellants. Paragraph eighteen, the final provision of count one, is similarly ineffective. It merely identifies a broad geographical area in which the

government believes at least "part" of the conspiracy transpired. How the government has divided the alleged conspiracy for the purposes of this claim, whether in time or by site of illicit conduct, is not disclosed.

Considering the remainder of count one, we note that paragraphs one through thirteen perform several functions. They define terms peculiar to an indictment charging illegal collusion in the highway construction business, identify the accused, and allege the involvement of unspecified co-conspirators. In addition, the paragraphs claim that interstate trade and commerce are affected by the illegal conduct charged and incorporate an affidavit and regulations pertinent to Oklahoma's contract-letting procedures for highway construction projects. Taken together, these introductory provisions of count one provide a framework on which the remainder of the indictment hangs, but they offer no specific details to bolster the allegation of an antitrust violation.

We turn then to counts two through seven of the indictment for factual detail sufficient to revive count one. The charge under counts two and three is that the appellants falsely represented to a federal agency that they had not participated in any scheme to fix prices when bidding on construction projects. Each count specifies the date on which a bid proposal was submitted and the exact federal-aid highway construction project that is the object of the proposal. The precise drafting of the allegations in both counts contrasts markedly with the loose construction of count one and thoroughly informs the appellants of the charges against them. Though these charges are rooted in the appellants' participation in the Oklahoma highway construction industry, we may not pour their particulars into the empty allegations of

count one. To do so would threaten the appellants with factual assertions that may not have been presented to the grand jury, a result which, as we explained in *Radetsky*, the Fifth Amendment will not abide. The risk of violating this constitutional guarantee springs from the textual differences between count one and counts two and three: paragraph fifteen of count one alleges that only "some" of the unspecified construction projects on which the appellants submitted rigged bids are federally funded. Yet both projects referred to in counts two and three were paid for—at least in part—by federal monies. The single conclusion that we may draw from the conjunction of these statements is that the object of the appellants' alleged antitrust violations are projects different from or in addition to those listed in counts two and three. It is irrelevant which of these possibilities is correct; the existence of either invalidates any attempt to imply a correspondence between the projects at issue in count one and those specified in counts two and three.

Counts four through seven of the indictment contain factual detail comparable to that in counts two and three. Their allegations refer to construction projects by project number and by citation to warrants for payment submitted by the appellants to the Oklahoma Department of Transportation. These references are sufficient to apprise the appellants of which transactions the government believes violate 18 U.S.C. § 1341. However, nothing in the text of these criminal charges compels the conclusion that the projects on which the appellants submitted warrants are the same as those associated with the antitrust violation alleged in count one. As a result, we may not read the specifications of counts four through seven into count one without once again subjecting the appellants to a criminal prosecution based on charges the grand jury may not have considered.

When we explore the entire indictment in search of the particulars necessary to sustain a charge of anti-competitive conduct, we view the same landscape the Court of Appeals for the Ninth Circuit surveyed in *United States v. Cecil*, 608 F.2d 1294, 1296-97 (9th Cir. 1979):

> The present indictment is a rather barren document. Aside from tracking the language of the pertinent statute in setting out the elements of the offense with which the defendants were charged, the indictment makes only two specific allegations concerning the conspiracies. It states that the conspiracies occurred in Arizona, Mexico, and elsewhere and offers the names of some of the alleged co-conspirators. The indictment fails to state any other facts or circumstances pertaining to the conspiracy or any overt acts done in furtherance thereof. More importantly, the indictment fails to place the conspiracies within any time frame. The language "beginning on or about July, 1975, and continuing thereafter until on or after October, 1975," is open-ended in both directions.

The only specific allegation pertinent to the antitrust violation charged is that a bid-rigging scheme was directed against the Oklahoma Department of Transportation and the Oklahoma Turnpike Authority. Nothing is disclosed about the site (or timing) of illegal activity other than "part" of it occurred in the Western District of Oklahoma. The appellants' co-conspirators are not identified, the circumstances of the collusive dealings are not revealed, and the projects the appellants are accused of rigging are not specified. Finally, the period in which the government claims the conspiracy transpired is anchored as loosely as that in the *Cecil* indictment. The

phrase "at least as early as July, 1978 and continuing thereafter at least through February, 1982" describes an unbounded span of time. Moreover, it conflicts with the statement in paragraph eighteen that the combination and conspiracy were formed within five years of August 22, 1984, the date the indictment was returned.[2]

The government responds to the appellants' allegations of vagueness with two arguments. Citing our decisions in *United States v. Boston*, 718 F.2d 1511 (10th Cir. 1983), *cert. denied*, 466 U.S. 974 (1984), and *United States v. Neal*, 692 F.2d 1296 (10th Cir. 1982), the government first asserts that an indictment is not required to include the evidentiary details of the intended prosecution. However, neither of these cases stands for this broad proposition. In *Boston*, an appeal of a conviction under the Hobbs Act, we said no more than "it is not necessary for the indictment in a Hobbs Act case to allege the exact nature of the interference with commerce." 718 F.2d at 1515. Our holding in *Neal* was similarly tailored to address the point of law at issue. There we distinguished the determination that must be made in prosecutions under 2 U.S.C. § 192 (refusal of witnesses to testify or produce papers) from that which must be made in prosecutions under 18 U.S.C. § 894 (using extortionate means to collect an extension of credit). Because the indictment had adequately alleged that one

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2. A statistic the appellants have provided indicates but one of the difficulties imposed on them by the indictment's lack of detail. The appellants claim that in the 43-month period mentioned in paragraph fourteen, the Oklahoma Department of Transportation invited bids on more than 700 highway construction projects. Record, doc. 44, at 3. Even if this figure is overestimated by a factor of ten, the number of projects the appellants are left to sort through is guaranteed to exhaust their capacity to mount an informed defense.

identified person had repeatedly threatened another in stated locations between certain dates, we concluded that "the content of [the defendant's] alleged threats would of course be material at trial, but greater specificity thereof in view of the other facts alleged in the indictment is not required in order 'to sufficiently apprise the defendant "of what he must be prepared to meet."'" *Neal*, 692 F.2d at 1302 (quoting *Russell*, 369 U.S. at 764).

Even if the holdings of *Boston* and *Neal* were precisely as the government has characterized them, the argument misses the point at issue. The appellants do not contend that the government has failed to disclose its evidence. Rather, they argue that the government has not adequately defined the factual allegations against them which it hopes to support with its evidence.

The government also defends the sufficiency of the present indictment on the ground that others similar to it have withstood appellate court scrutiny. The indictment employed in the prosecution underlying *United States v. Washita Construction Co.*, 789 F.2d 809 (10th Cir. 1986), and the indictment at issue in *United States v. Fischbach and Moore, Inc.*, 750 F.2d 1184 (3d Cir. 1984), *cert. denied*, 470 U.S. 1029 (1985), are offered as examples.

The prosecution of Washita Construction Company was in all relevant respects identical to that which the government pursued against the appellants here. In a seven-count indictment, the government charged Washita and its president with submitting collusive, noncompetitive and rigged bids to, and withholding bids from, the Oklahoma Department of Transportation; making false, fictitious, and fraudulent statements; and engaging in mail fraud by receiving progress payments from the state

of Oklahoma. While the prosecutions in the two cases may be substantive twins, the language of the indictment returned in *Washita* was not, as the government claims, "essentially identical" to that involved in this matter. The indictment in *Washita* not only charged that the defendants had rigged bids on a specified number of highway construction projects (seven), it also identified the projects by project number and date of contract-letting. 789 F.2d at 812 n.3. Thus, the defendants in *Washita* were given ample information regarding the particulars of the government's charge and did not even contest the sufficiency of the indictment on appeal.

It is impossible for us to comment upon the language of the indictment brought before the court of appeals in *Fischbach and Moore*. The court's opinion in that case contains only fragmentary quotations from the indictment,[3] and the government has not provided a copy of it for us to examine. We note, however, that just as in *Washita*, the sufficiency of the indictment was not challenged on appeal.[4]

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3. We learn the details of the prosecution only from the court's statement of the procedural history of the case:

> "As a result of investigating [a] bid-rigging scheme, the government accused a number of the electrical contractors and their employees of antitrust violations. The indictment charged them with violating § 1 of the Sherman Act by conspiring to allocate electrical construction projects at the Western Pennsylvania Works, to fix the prices at which those projects were bid, and to submit noncompetitive, collusive, and rigged bids on those projects.

Fischbach and Moore, 750 F.2d at 1188.

4. An indictment couched in terms strikingly similar to those challenged here may be found in the margin of United States v. Braniff Airways, Inc., 428 F. Supp. 579 (W.D. Tex. 1977). Although it dismissed the indictment for other reasons, the Braniff court commented in passing: "Any close exam-

(Continued on following page)

In view of the deficiencies described, I believe that count one of the indictment failed to inform the appellants of the "nature and cause of the accusation" against them in violation of the Sixth Amendment. As a result, the appellants were forced to resort to speculation and inference when answering the government's accusations and were thereby deprived of the opportunity to prepare a proper defense.[5]

Although I would reverse on the issue regarding the sufficiency of the indictment, I concur with the majority's disposition of all other issues presented.

Footnote continued—

ination of the indictment strongly suggests that it fails to set forth the specific acts and particular facts constituting the alleged offenses, and thus failed to state the essential elements of the crime which is charged." *Id.* at 584-86 n.5.

5. While this Sixth Amendment violation alone is sufficient to invalidate count one, I also conclude that the same infirmities subvert the Fifth Amendment guarantee that the appellants will be convicted only upon facts presented to the grand jury that indicted them—an infirmity which even a bill of particulars or additional discovery could not possibly cure.

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT
United States Courthouse
Denver, Colorado 80294

Robert L. Hoecker
Clerk

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July 28, 1989

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Re: 86-1756, USA v. Mobile Materials
(Lower docket: Cr-84-147-E,)

Dear Counsel:

Enclosed is a copy of the opinion of the court in the captioned case. Judgment in accordance with the opinion has been entered today.

Please call this office if you have questions.

Sincerely,

Robert L. Hoecker
Clerk
/s/ Patrick Fisher
By: Patrick Fisher
Chief Deputy Clerk

RLH:oac

Enclosure

cc: Luther B. Eubanks, Chief Judge

(Filed July 28, 1989)

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 86-1756

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

MOBILE MATERIALS, INC. and
GERALD O. PHILPOT,
Defendants-Appellants.

Appeal From the United States District Court
for the Western District of Oklahoma
(D.C. No. CR-84-147-E)

Mack Muratet Braly of Mack Muratet Braly & Associates, Tulsa, Oklahoma, for Defendants-Appellants.

Andrea Limmer, Attorney, Department of Justice, Washington, D.C. (Douglas H. Ginsburg, Assistant Attorney General; W. Stephen Cannon, Deputy Assistant Attorney General; and John J. Powers, III, Attorney, Department of Justice, Washington, D.C., with her on the brief), for Plaintiff-Appellee.

Before McKAY, MOORE and BALDOCK, Circuit Judges.

ON PETITION FOR REHEARING

PER CURIAM.

In our last disposition of this case, we declined to consider various points raised by appellants because we lacked relevant portions of the trial transcript. *United States v. Mobile Materials, Inc.* (*Mobile Materials II*), 871 F.2d 902, 906 n.1, 918 (10th Cir. 1989). This case illustrates the need for appellate counsel to monitor carefully the preparation, designation and transmission of the record on appeal. Three problems occurred here.

First, although a substantial portion of the trial transcript was ordered and filed[1] at the district court, some portions of the filed transcript were not transmitted to the court of appeals. *See* Fed. R. App. P. 10(b)(1) (appellant must order transcript); Fed. R. App. P. 11(b) (court reporter must file transcript with the clerk of the district court & clerk must transmit complete record to court of appeals). These portions of the transcript were not transmitted to the court of appeals because they were not designated for transmission. *See* Appellants' Petition for Rehearing, ex. I (Designation of Record on Appeal filed Sept. 29, 1986).

The second problem in this case is that another portion of the transcript was never filed with the district court, nor was it designated for transmission. We think that these errors should have been apparent to counsel upon receipt of his copy of the district court clerk's letter of October 28, 1986, transmitting the limited record on appeal and containing the district court docket sheet as

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1. Appellants correctly point out that a filed transcript is part of the record on appeal. Fed. R. App. P. 10(a). However, ordinarily, this court considers appeals on a limited record which has been designated for transmission by the parties. *See* 10th Cir. R. 10 & 11 (Jan. 1, 1989).

an index to the record on appeal. In the interest of justice, however, we granted appellants' motion to supplement the record with the missing volumes of transcript that had been filed with the district court. For the same reason, we also obtained a final volume of the transcript which had not been filed at the district court.

The third problem is that no statement of proceedings was prepared by appellant upon learning that a reporter was unable to locate notes of a brief exchange between the court and the jury. Fed. R. App. P. 10(c) allows for such a statement to be included as part of the record on appeal when a transcript is unavailable. The exchange in question occurred when the jury reported to the court that it was unable to reach a verdict. No steps have been taken to cure the problem of the missing notes, and the parties disagree about the characterization of the district court's brief statements.

We now consider the balance of the appeal. On rehearing, we affirm the judgments below.

I.

"Any agreement between competitors pursuant to which contract offers are to be submitted or withheld from a third party constitutes bid rigging per se violative of 15 U.S.C. section 1." *United States v. Portsmouth Paving Co.*, 694 F.2d 312, 325 (4th Cir. 1982); *United States v. W.F. Brinkley & Son Constr. Co.*, 783 F.2d 1157, 1160-61 (4th Cir. 1986). Appellants (Philpot and Mobile) contend that the case should not have been submitted to the jury on the theory of a grand conspiracy to rig bids. Appellants argue that evidence concerning jobs unrelated to appellants should not have been admitted, and they attack the sufficiency of the evidence which

supports the jury's implicit finding of a single conspiracy to rig bids. The arguments of appellants focus on the admissibility of co-conspirator hearsay and whether there was a variance between the indictment and the proof at trial.

A.

Concerning the district court's decision to admit co-conspirator statements, appellants contend that those co-conspirator statements pertained to "unrelated" jobs, were hearsay, and should not have been admitted. They suggest that the trial court did not admit the statements in accord with the requirements outlined in *United States v. James*, 590 F.2d 575, 580-82 (5th Cir.), *cert. denied*, 442 U.S. 917 (1979), and *United States v. Petersen*, 611 F.2d 1313, 1330-31 (10th Cir. 1979), *cert. denied*, 447 U.S. 905 (1980).

In *United States v. Hernandez*, 829 F.2d 988 (10th Cir. 1987), *cert. denied*, 108 S. Ct. 1486 (1988), we recognized that after *Bourjaily v. United States*, 107 S. Ct. 2775 (1987), a trial court may admit statements of co-conspirators under Fed. R. Evid. 801(d)(2) after finding, by a preponderance of the evidence that: 1) a conspiracy existed, 2) the declarant and the defendant against whom the declarations are offered were members of the conspiracy, and 3) the statements were made in the course of and in furtherance of the conspiracy. *Hernandez*, 829 F.2d at 993. In making these determinations, the trial court may rely on both the hearsay statements and the independent evidence presented. *Bourjaily*, 107 S. Ct. at 2782; *United States v. Wolf*, 839 F.2d 1387, 1393 (10th Cir.), *cert. denied*, 109 S. Ct. 304 (1988). Thus, the trial court is not limited to independent evidence in making its preliminary factual determinations. *United States v.*

Chestang, 849 F.2d 528, 530-31 (11th Cir. 1988); *United States v. Perez*, 823 F.2d 854, 855 (5th Cir. 1987) (*Bourjaily* "effectively abolishes our *James* constraints"). When practical, the trial judge should make these factual determinations before allowing the co-conspirator statements to be heard by the jury. *Hernandez*, 829 F.2d at 994. However, we have recognized that the trial judge has "considerable discretion" to admit the statements conditionally, subject to their later being connected up. *Id.* at 994 n.6. Regardless of the order of proof, the district court should make or reaffirm the requisite factual determinations at the conclusion of the evidence. *Petersen*, 611 F.2d at 1230.

In this case, the trial court admitted certain challenged statements conditionally and then determined that the requirements for admissibility had been satisfied after the testimony of the government's first immunized witness, Ken Jacobs. Jacobs testified that he participated in bid-rigging on Oklahoma highway projects when he became area manager for South Prairie Construction Co. in 1978. He testified that "that just seemed to be the way that the business was done." Rec. supp. I, vol. II at 93. Jacobs generally described how the bid-rigging process worked[2] and then discussed particular jobs involving Philpot and Mobile.

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2. In *United States v. Washita Constr. Co.*, 789 F.2d 809, 813-814 (10th Cir. 1986), we described the mechanics of a scheme to rig bids on Oklahoma highway construction projects. That description comports with the government's evidence in this case. We do not repeat that description, except to say that the government, in its bill of particulars, named the following companies as co-conspirators with defendants: Amis Constr. Co., Broce Constr. Co. of Okla, Inc. (Broce), Cherokee Paving Co. (Cherokee), Cornell Constr. Co., Cummins Constr. Co., Evans & Assoc. Constr. Co., Frascon, Inc. (Frascon), Glover Constr. Co., Inc., McConnell Constr. Inc., Shawnee Paving Co., South Prairie Constr. Co. (South Prairie) and Washita Constr. Co. (Washita).

According to Jacobs, "he gave some work away and also took some." *Id.* at 94. He explained a system of complimentary bidding. This system enabled various contractors to prearrange which contractor would submit the lowest bid. Several contractors might agree to submit complimentary bids above an amount specified by a prearranged low bidder, thereby making it quite likely that the prearranged low bidder would be awarded the project. A contractor might agree to submit a complimentary bid because he had received a similar favor in the past. Alternatively, a contractor might agree to submit a complimentary bid, or refrain from bidding entirely, because of a promise by the prearranged low bidder to let that contractor have a job in the future. By its very nature, this scheme was ongoing—future projects served both to create and to satisfy obligations.

The first jobs that Jacobs testified about were SAP-63(126) and SAP-67(83) (the Seminole projects), let by the Oklahoma Department of Transportation (ODOT) on December 21, 1978. Jacobs testified that Philpot contacted him and indicated that he was interested in these jobs. Jacobs agreed to submit complimentary bids on behalf of South Prairie which he thought would assist Mobile in being awarded SAP-67(83) and Cherokee in being awarded SAP-63(126). According to Jacobs, he had not heard from either Philpot of Mobile or Stuart Ronald of Cherokee and needed to submit his complimentary bids. Jacobs needed amounts to bid above on both projects to avoid the risk of being the low bidder. He testified that he went to a hotel room at the Lincoln Plaza Hotel and was given two numbers to bid above by Philpot and Ronald. Jacobs then turned in his complimentary bids for South Prairie.

Jacobs then testified about rigging project WR-MC-18, the Will Rogers Turnpike job, bid on July 12, 1979. Jacobs

said he had been contacted by Ray Broce of Broce Constr. Co. Broce agreed that he would assist Jacobs in getting the Turnpike project by submitting a complimentary bid. In return, Jacobs agreed to submit a complimentary bid on another project near Ratliff City (Stephens-Carter counties) which Broce wanted. Jacobs delivered a figure to representatives of Broce to enable them to prepare a complimentary bid. Jacobs also testified that he talked to Philpot about the Turnpike job before it was let. Jacobs learned that Philpot was possibly going to bid on the Turnpike job. Jacobs negotiated with Philpot and induced him to give up the Turnpike job in exchange for a complimentary bid on a future project. An upcoming project, F-236(11) (the Ada Bypass), was discussed. Jacobs then related how he withheld South Prairie's bid on the Ada Bypass project because Philpot wanted the Ada Bypass job, and Philpot had helped Jacobs obtain the Turnpike job.

The next job Jacobs testified about was F-91(15), a road-widening job between Davis and Sulphur (the Murray County job). According to the government, South Prairie, Mobile Materials, Washita and Broce rigged the job in favor of Broce, but it was not awarded because the low bid by Broce was too far in excess of the state estimate. Jacobs testified that he initially agreed to give Broce a complimentary bid on F-91(15) with the understanding that Broce would submit a complimentary bid on a project near Perry (the Noble County or I-35 job). South Prairie was awarded the contract on the project near Perry. Thereafter, Jacobs did not submit a bid on F-91(15). According to Jacobs, he agreed to let Broce have F-91(15) because he no longer wanted to rig bids, but he had a commitment to Broce. Sam Beyer, former Oklahoma field superintendent for Broce Constr. Co., later

testified that Philpot was to provide a complimentary bid on F-91(15) based on the numbers Broce provided him.

Not every contractor who was interested in a project could be or would be approached by the members of the conspiracy. Although Jacobs knew which contractors had ordered plans for the various projects, he also knew it was unlikely all would submit competitive bids because of: 1) the nature of the particular projects and, 2) the competitive position of the contractors. Thus, he could surmise the likelihood that a job could be rigged. He could be selective about seeking complimentary bids and thereby creating obligations. For example, Jacobs only contacted Philpot and Broce in an effort to insure that he would be the low bidder on the Turnpike job.

We have reviewed the objections made by appellants during the testimony of Jacobs. Initially, appellants objected on the basis of hearsay when Jacobs testified that he had been contacted by another co-conspirator, Broce. Rec. supp. I, vol. II at 103. The court properly overruled the objection at this point because Jacobs' testimony was not hearsay. The direct testimony of a conspirator (Jacobs) describing his participation in the conspiracy and the actions of others is not hearsay, and the cases concerning co-conspirator hearsay under Rule 801(d)(2) are inapplicable. *United States v. Smith*, 692 F.2d 693, 697-98 (10th Cir. 1982). Thereafter, Jacobs did testify as to statements made by Broce. Sometime later, appellants objected to Jacobs' testimony concerning jobs which did not involve appellants directly. When the trial court made its ruling concerning the admissibility of co-conspirator statements, appellants objected, not on hearsay grounds, but on grounds that the prejudicial effect of Jacobs' testimony outweighed its probative value. Fed. R. Evid. 403.

The government suggests that the appellants failed to object to co-conspirator statements on grounds other than Rule 403. When viewing the record as a whole, however, it is apparent that appellants repeatedly objected to the admissibility of co-conspirator statements as not meeting the requirements of Rule 801(d)(2). Fed. R. Evid. 103(a)(1), requiring a timely objection to evidence which is admitted, was satisfied. The district court, however, did not abuse its discretion in overruling these objections.

There was substantial evidence of a conspiracy to rig bids on Oklahoma highway construction projects. Several contractors had a tacit agreement to share the work and allocate it by rigging bids. The purpose was to circumvent price competition and enhance profitability. *See United States v. Beachner*, 729 F.2d 1278, 1283 (10th Cir. 1984). The conspiracy was self-perpetuating and could be plugged into at any time. *Id.* at 1282. Jacobs' testimony directly connected appellants to that conspiracy insofar as the Seminole and Will Rogers Turnpike jobs. Testimony of other witnesses concerning the rigging the Ada Bypass job, particularly the testimony of Clay Wilson and James Freeman, which we discuss below, also connected appellants directly to the conspiracy. Finally, the co-conspirator statements admitted were in the course of and in furtherance of the conspiracy. The statements pertain mainly to setting up bids, the negotiations between the conspirators. At the conclusion of the evidence, it was apparent that the government had connected up the conspiracy evidence.

Appellants seem to argue that a prerequisite to the admissibility of co-conspirator statements is a direct link with independent evidence between every project men-

tioned at trial and the appellants. *See* Appellants' Reply Brief at 11-12. Not so. As noted, the court may consider both independent evidence and the statements themselves in deciding whether the statements are admissible under Fed. R. Evid. 801(d)(2). *Bourjaily*, 107 S. Ct. at 2782. A party who joins a conspiracy becomes criminally liable for all acts done in furtherance of that conspiracy. *United States v. Andrews*, 585 F.2d 961, 964 (10th Cir. 1978) (reviewing conspiracy law principles). It must be established the declarant and the defendant against whom the statement is offered were members of the conspiracy and that the statement was in the course of and in furtherance of the conspiracy. *Hernandez*, 829 F.2d at 993. Once that is established, the government is not limited to asking only about jobs which the co-conspirator will identify as rigged by the defendant. Of course, lest the government get too far afield, the evidence must be relevant and not unfairly prejudicial. Fed. R. Evid. 402 & 403. Here, the government elicited many co-conspirator statements from various witnesses in order to prove the mechanics and ongoing nature of the conspiracy. A number of rigged jobs were mentioned as the government sought to establish that Philpot had submitted or had received complimentary bids or had refrained from bidding as part of the process. In light of the entire record, we conclude that the trial judge was within his discretion in admitting this evidence, notwithstanding appellants' claim of unfair prejudice. The jury was instructed that the guilt or innocence of each defendant should be based on the words or actions of that defendant. Appellee's Addendum to Brief, Instr. Nos. 5 (jury must consider evidence as it relates to defendants on trial, despite references to other co-conspirators), 12 (mere association not proof of conspiracy).

B.

Appellants claim that the district court should have directed a judgment of acquittal in their favor because the evidence at trial proved several separate conspiracies, each involving a different highway project, rather than a single conspiracy. Essentially, appellants are arguing a variance between the pleading and the proof in this case. A variance occurs when the trial evidence establishes facts different than those charged in the indictment. *United States v. Dickey*, 736 F.2d 571, 581 (10th Cir. 1984), *cert. denied*, 469 U.S. 1188 (1985). Such a variance may be prejudicial if it "affects the substantial rights of the accused." *United States v. Morris*, 623 F.2d 145, 149 (10th Cir.), *cert. denied*, 449 U.S. 1065 (1980). In *Kotteakos v. United States*, 328 U.S. 750 (1945), the Court recognized the danger of transference of guilt when the evidence supported not a single conspiracy, but rather several separate conspiracies only connected by the participation of one key figure in each. *Id.* at 773-774.

The government was required to prove that Philpot and Mobile "agreed with at least one other individual or entity to participate in the unlawful contract allocation and bid rigging charged." *Portsmouth Paving Corp.*, 694 F.2d at 318. Appellants acknowledge that whether the evidence is sufficient to establish a single conspiracy is a factual matter. *See United States v. Record*, ... F.2d ....., ... No. 88-1405 slip op. at 7 (10th Cir. Apr. 28, 1989). Upon our review, the evidence must be cast in the light most favorable to the government, and we consider all of the evidence, both direct and circumstantial. *Id.* at 8. Applying this standard, there is ample evidence of a single conspiracy to submit collusive, noncompetitive and rigged bids, or to withhold bids, on construction proj-

ects during the time period specified in the indictment. The evidence reflects "significant overlap in personnel, method of operation, and purpose." *Id.*

Indeed, appellants concede the sufficiency of the evidence for a conspiracy concerning the Seminole Projects (SAP-63(126) and SAP-67(83)), and the Ada Bypass project F-236(11). *See* Appellants' Brief at 20 n.6. We have discussed the evidence pertaining to the Seminole projects which implicates appellants, and there is a strong link between appellants and anticompetitive behavior on the Ada Bypass project.[3]

Mobile was awarded the Ada Bypass job after Frascon, Inc. and Nineteenth Seed Co. submitted higher bids. As noted, Jacobs of South Prairie testified that he did not submit a bid on the Ada Bypass project, thereby keeping with his agreement to repay Philpot for not submitting a bid on the Will Rogers Turnpike project. Clay Wilson, president of Nineteenth Seed Co., testified that he intended to bid on the Ada Bypass project, but was contacted by Philpot prior to the letting. According to Wilson, Philpot requested that Wilson not submit a bid. Wilson still intended to submit a bid, but when he contacted Jacobs of South Prairie to get a subcontract price on concrete work, Jacobs said he would not give Wilson a quote because Jacobs had promised Philpot that he would not bid or quote a price on the Ada Bypass project.

James Freeman of Frascon testified that he planned to bid the Ada Bypass project competitively, but that he was contacted by Philpot prior to the letting. According

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3. Concerning the Ada Bypass project, appellants were convicted in count 3 of making false and fraudulent statements to the United States Department of Transportation, by filing a false affidavit of non-collusion.

to Freeman, Philpot requested that Freeman not submit a bid. Freeman's father, who had final bid authority for Frascon, then agreed with Philpot that Frascon would increase its bid to exceed the state engineer's estimate for the project. And that is what happened. Frascon, who would have submitted the low bid but for the collusion, submitted a rigged bid eight percent over the estimate, and was not awarded the job. Rec. supp. I, vol. III at 186.

Other evidence supports the finding that these defendants were part of a Sherman Act conspiracy. Don Hurst of Shawnee Paving Co. testified that Philpot inquired as to whether Hurst was bidding on SAP-67(109) (Seminole County), which was let on July 25, 1980. When Hurst answered in the affirmative, Philpot requested that Hurst not bid the job, but if he did, that he bid around the state engineer's estimate. *Id.* at 312.

Appellants contend that there was error because the jury was misled by evidence of "unrelated" jobs. Appellants' Brief at 22. If the jobs were truly unrelated to this conspiracy and appellants' participation in it, we might agree. But that is not the case. The government may prove a combination and conspiracy in restraint of trade by showing concerted activity designed to achieve that end. *Mobile Materials II*, 871 F.2d at 908. Thus, testimony about the various agreements which facilitated the objective of the conspiracy was permissible. The government need not show that every attempt to rig bids was successful or that every bid on a project was the product of collusion. And after connecting appellants to a particular job which appears to be rigged, the government may then introduce evidence about how the job was rigged. Concerning the Will Rogers Turnpike job, the district court did not abuse its discretion in allowing Jacobs to testify

that Broce Constr. Co. was willing to submit a complimentary bid on the project if Jacobs would submit one on the project near Ratliff City (Stephens-Carter Counties). In explaining how the turnpike project was set up, Jacobs directly implicated appellants. That testimony was later corroborated by witnesses associated with Jacobs.

Appellants also challenge the testimony concerning F-91(15), the road-widening job near Davis and Sulphur (Murray County), which the government claimed was rigged by South Prairie, Mobile Materials, Washita and Broce. At trial, the government's witnesses did not testify directly that Philpot's bid on the project was complimentary; however, Sam Beyer of Broce testified that the job was set up and that he assisted in working out the numbers so that Broce would be the prime contractor and Washita would be a subcontractor. Rec. supp. I, vol. II at 238, 241-42. He also testified that Philpot had the numbers which the parties had worked out. *Id.* at 244. Though the issue is close, we have read the testimony in its entirety and we cannot say that it was an abuse of discretion for the trial court to admit evidence concerning F-91(15). From this, it follows that the trial court could admit evidence concerning the other jobs which were exchanged for complimentary bids on F-91(15). Thus, Jacobs could testify that he was amenable to submitting a complimentary bid on F-91(15) in exchange for Broce submitting a complimentary bid on the project near Perry (Noble County, I-35 job).

Appellants also objected to the testimony of Jacobs' former boss, James Baldwin, on Fed. R. Evid. 403 grounds. Rec. supp. I, vol. II at 208. Baldwin corroborated the testimony of Jacobs and explained the mechanics of the bid-rigging process. He testified to the ongoing nature

of the conspiracy, explaining that if a contractor sets up a job with several complimentary bids, it will take more than a few months to pay back all the complimentary bidders. Indeed, "absent an affirmative showing of the termination of the agreement, the conspiracy must be presumed to have continued." *Portsmouth Paving Corp.*, 694 F.2d at 318. Again, we find no abuse of discretion by the trial judge in admitting this testimony. Appellants were able to point out on cross examination that some of the witnesses simply had no direct knowledge which would connect the appellants to rigged bids.

II.

Continuing the variance argument, appellants suggest that if the proof established one or more smaller conspiracies in which they participated, their convictions must be reversed. They contend that the jury was not instructed properly on the necessity of finding a single conspiracy. Appellants rely on *United States v. Mastelotto*, 717 F.2d 1238 (9th Cir. 1983), and *United States v. Miller*, 715 F.2d 1360 (9th Cir. 1983), *modified*, 728 F.2d 1269, (9th Cir. 1984), *rev'd*, 471 U.S. 130 (1985). To the extent that appellants are arguing that a defendant's fifth amendment grand jury guarantee is compromised if the government proves a narrower scheme at trial than alleged in the indictment, those portions of *Miller* and *Mastelotto* so holding were overruled in *United States v. Miller*, 471 U.S. 130, 135 (1985). *See United States v. Parkhill*, 775 F.2d 612, 615 n.6 (5th Cir. 1985) (recognizing overruling). In *Miller*, the Supreme Court indicated that the fifth amendment grand jury guarantee is not violated if a defendant is convicted upon evidence which tends to show a narrower scheme than that contained in the indictment, provided that the narrower

scheme is fully included within the indictment. *Miller*, 471 U.S. at 135-138.

Appellants argue that there is a risk that some of the jurors may have found the broad conspiracy to rig bids as alleged in the indictment while others may have found a conspiracy limited to the Ada Bypass project. Appellants' Brief at 30. In *Mastelotto*, a concern, still viable after *Miller*, was insuring that a defendant's right to a unanimous verdict is respected by instructing the jurors that they must all agree on the existence of, and defendant's participation in, the same scheme to defraud. *See also United States v. Echeverry*, 698 F.2d 375 (9th Cir.), *modified*, 719 F.2d 974 (9th Cir. 1983) (if jurors might be confused concerning multiple conspiracies based on different acts, it may be necessary to augment unanimity instruction).

In settling the jury instructions, appellant objected that their proposed jury instruction was not used. *See* rec. supp. III, vol. I at 161-62 (objections); rec. vol. I, doc. 110 at 35-36 (proposed jury instruction entitled "Single Conspiracy or Acquit"). The instruction attempted to amplify the proposition that if the jury found separate conspiracies, rather than the single conspiracy contained in Sherman Act count of the indictment, it must acquit the appellants. That jury instruction was an incorrect statement of the law, however, to the extent that it required the jurors to find that every project listed in the bill of particulars supplied by the government was part of the Sherman Act conspiracy described in count I of the indictment. As noted, the government may prove a narrower scheme than alleged. *Miller*, 471 U.S. at 140. The instruction given correctly noted that the jury was not required to find that *every* project in which defendants were involved was part of the conspiracy.

At the charging conference, appellants wanted their proposed instruction because it instructs that, if the jury found that the single conspiracy charged in the indictment did not exist, then it must acquit the defendants, not only on the Sherman Act count, but also on the other substantive counts contained in the indictment. Rec. supp. III, vol. I at 162. This statement is wrong; a failure of proof on the Sherman Act count did not require the jury to acquit on the false swearing and mail fraud counts. The district court properly rejected the proposed instruction. Again, the instruction given was adequate; it told the jury that it must find the defendants not guilty of the Sherman Act count if it concluded "that the government has failed to prove the existence of the single, continuing conspiracy charged in the indictment."

III.

Appellants argue that the government should not have informed the jury that several of its witnesses rigged bids and were immunized from prosecution. Appellants claim that the government also elicited information about the convictions of witnesses who testified, or about the convictions of the companies they worked for. There being no contemporaneous objection, we analyze this claim for plain error affecting substantial rights of the accused. Fed. R. Civ. P. 52(b). We find that this claim is without merit.

Appellants rely on *United States v. Austin*, 786 F.2d 986 (10th Cir. 1986), which held that the convictions of ten co-conspirators, two of whom testified, could not be used as substantive evidence of guilt in considering the case against the defendants on trial. *Id.* at 991-992. For credibility purposes, the conviction of a testifying code-

fendant may be elicited by the government or the defense, but a cautionary instruction, restricting the use of the conviction to credibility, is generally essential. *United States v. Baez*, 703 F.2d 453, 455 (10th Cir. 1983).

The government made no reference to any convictions in its opening statement, or closing argument. No convictions related to this case were disclosed during the government's examination of its witnesses.[4] In its opening statement, the government told the jury that it was presenting part of its case with the testimony of contractors who admitted their participation in bid-rigging and whom had been granted immunity from prosecution for truthful testimony. Rec. supp. I, vol. I at 12. This simply is not a case in which the government was arguing directly or indirectly that appellants were guilty because other co-conspirators had entered into immunity agreements with the government. To the contrary, the government was simply anticipating "attempts by defense counsel to attack its witnesses' credibility." *United States v. Koppers Co., Inc.*, 652 F.2d 290, 299 (2d Cir.), *cert. denied*, 454 U.S. 1083 (1981). Indeed, beginning with his opening statement,[5] defense counsel did use the immunity agreements

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4. During the course of the trial, two witnesses referred to convictions unrelated to this prosecution. When he was asked why he left South Prairie, Jacobs explained the circumstances. He testified that after South Prairie's parent entity had been convicted of bid rigging in another state, he was asked to sign a letter that he had not engaged in bid rigging. He was terminated when he could not do so. Rec. supp. I, vol. II at 89.

Another government witness, Baldwin, testified concerning the impetus of his plea agreement with the government. He testified that after his general superintendent in Kansas had been convicted of bid rigging, he (Baldwin) decided to enter into a plea agreement with the government.

5. Mr. Braley: Keep in mind as you are listening to the government's witnesses, as Mr. Gardner told you about this

(Continued on following page)

to attack the credibility of the government's witnesses. Each immunized witness discussed his participation in bid-rigging and was subject to cross examination by the defense. In rebuttal, the government argued that the jury should look at the testimony of its immunized witnesses carefully because they had been granted immunity. Rec. vol. III at 23.

We reject out of hand the notion that the government may not disclose immunity agreements with its witnesses on direct examination for the permissible purpose of minimizing damage to the credibility of these witnesses. We cannot say that the absence of a cautionary instruction during the trial concerning immunity agreements constituted plain error when the permissible purpose of introducing the immunity agreements was clear, and the evidence concerning the participation of the appellants was strong and corroborated by non-immunized witnesses. *United States v. Peterman*, 841 F.2d 1474, 1481 (10th Cir. 1988), *cert. denied*, 109 S. Ct. 783 (1989).

IV.

Appellants next take issue with the trial judge's management of the case during trial and during the jury's deliberations. Specifically, appellants raise three objections: (1) the court's evidentiary rulings were prejudicial

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Footnote continued—

> immunity. To me, this immunity is the Government's dirty little secret. These men come in here and they have every reason to indulge in the maximum amount of maybes and probablies and supposeds and gee, I think so, and he bid the job so he must have been all right and words like this. I want you to listen for these weasley, slimey words from the these Government immunity witnesses because those words should not be allowed to convict a man of the serious crime of bid rigging.

Rec. supp. I, vol. I at 25; *see also id.* at 27.

to appellants' attempts to show that they were not connected to a conspiracy to rig bids, (2) the court interjected unsolicited comments into the trial process, and the court's post-trial admonitions to the jury coerced a verdict adverse to appellants.

A.

The first of these arguments concerns the testimony of various government witnesses who attempted to implicate appellants in bid-rigging. Beyer, a Broce employee, testified concerning the rigging of F-91(15), a road-widening job between Davis and Sulphur (the Murray County job). Beyer testified that he and Bill Anthony of Washita, agreed to the numbers they would bid on the job so that Broce would get the job. Beyer also testified that Philpot, who also bid the job, was in Anthony's hotel room at the Lincoln Plaza when Beyer went there in the morning to discuss the bids. Although Beyer testified that there was no discussion about the bids in the presence of Philpot and that Beyer did not know whether Philpot was in on the bid-rigging, that hardly renders Beyer's testimony irrelevant. Beyer had testified before the grand jury that Philpot had agreed to submit a complimentary bid on the project, and the government impeached Beyer with that testimony. Moreover, on cross-examination, defense counsel highlighted the weaknesses of Beyer's testimony at trial and before the grand jury.

Appellants also claim that it was error to admit the testimony of two other Broce employees (Taylor and Vance) about the Murray County job and the job near Ratliff City (Stephens-Carter Counties) because these witnesses could not connect the appellants with these jobs. We think that the government did connect Philpot to the

Murray County job and, as discussed previously, the testimony concerning the Ratliff City job was allowable to explain how the Will Rogers Turnpike job was set up. Philpot was directly implicated in the set-up of the Turnpike job.

Next, appellants claim that the district court erred when it permitted Donald Hurst of Shawnee to testify. If we are reading appellants' brief correctly, the claim here is that there was no link between appellants and Hurst, and indeed, Hurst's testimony "exonerated" appellants concerning the only job which would provide a possible link, SAP-67(109) (Seminole County). Appellant's Brief at 43-44. This is absurd. Hurst testified that Philpot asked him not to bid the job or to bid the job around the state estimate. This testimony was relevant in the extreme concerning appellants' involvement in a bid-rigging conspiracy. It makes no difference that Hurst did not alter his bid as a result of Philpot's request.

B.

Appellants complain that they were denied a fair trial because the judge was impatient and angry with defense counsel throughout the trial. According to appellants, the judge's manner conveyed to the jury the impression that the court thought the appellants guilty and the case unimportant. Appellants also contend that they were unable to argue adverse rulings or to make a record. Finally, appellants contend that the court favored the government over the defendants.

Though it is easy to counsel patience and restraint from the appellate level, our concern must be with the "essential fairness of the trial," because the law, secularly applied, only insures a fair trial, not a perfect one. *United*

States v. Shelton, 736 F.2d 1397, 1405 (10th Cir.), *cert. denied*, 469 U.S. 857 (1984). We have reviewed the catalog of incidents which appellants have compiled from the transcript to support their claims and do not find reversible error. A trial judge has the prerogative to clarify evidence and assist the jury, provided his comments do not mislead and are not one-sided. *United States v. Singer*, 710 F.2d 431, 436 (8th Cir. 1983) (en banc). Likewise, a trial judge may exclude or limit questions or testimony *sua sponte* to expedite the trial, and justice still may be done. The trial judge did not display personal animosity against defense counsel; consistent adverse rulings, without more, do not constitute animosity. *United States v. Panza*, 612 F.2d 432, 440 (9th Cir.), *cert. denied*, 447 U.S. 925 (1980).

We are more concerned with counsel's allegations that he was not allowed to make a record because the court summarily denied his objections and refused to state the basis of its rulings. Counsel also tells us that the court conducted sidebar conferences which were not recorded. Of course, under Fed. R. Evid. 103(a)(1), counsel must be allowed to state the specific ground of objection when it is not apparent from the context. The court can require explanations to be concise, however. And under 28 U.S.C. § 753(b), all court proceedings in criminal cases must be recorded. *United States v. Gallo*, 763 F.2d 1504, 1529-32 (6th Cir. 1985), *cert. denied*, 474 U.S. 1068 (1986). We have reviewed the entire record in this case and think that the district court was familiar with the basis of the objections of appellants. Both parties were represented by able counsel. The summary denial of counsel's objections occurred infrequently, and prejudice has not been demonstrated. As for the sidebar conferences which were not recorded, counsel did not object, but more sig-

nificantly, no specific error and prejudice has been claimed by appellants. *United States v. Ellzey*, ... F.2d ....., ...-..... [89 W.L. 38353] Nos. 88-3459 & 88-3470, slip op. (6th Cir. Apr. 24, 1989); *Edwards v. United States*, 374 F.2d 24, 26 (10th Cir. 1966), *cert. denied*, 389 U.S. 850 (1967). Accordingly, reversal on these points is unwarranted.

C.

At the end of one day's deliberation, the jury foreman sent the court a note advising that the jury was unable to reach a verdict. Appellants contend that the trial court then delivered what amounted to an *Allen*[6] charge which was improper. Even after granting appellants' motion to supplement the record, we do not have a transcript of the district court's comments; according to appellants, as of 1986, the court reporter was unable to locate the notes. Appellants assert that the district court emphasized "the court's crowded docket and herculean efforts to keep the case load moving." Appellants' Brief at 44. Appellants forthrightly admit that they did not object to the court's comments; thus, our review would be restricted to plain error, viewing appellants' claim of error against the entire record. Fed. R. Crim. P. 52(b); *United States v. Young*, 470 U.S. 1, 14-16 (1984).

To the extent that an *Allen* instruction was not given with the general instructions to the jury, but instead during the course of the jury's deliberations, appellants claim error and rely upon *United States v. Blandin*, 784 F.2d 1048, 1050 (10th Cir. 1986). But in *United States v. McKinney*, 822 F.2d 946, 950-51 (10th Cir. 1987), we

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6. *Allen v. United States*, 164 U.S. 492 (1896).

made it clear that *Blandin* did not adopt a *per se* rule prohibiting an *Allen* instruction once a jury commenced deliberations.

We also noted in *McKinney* that whether an *Allen* instruction constituted error depended upon whether the instruction was coercive after reviewing the facts of each case. *McKinney,* 822 F.2d at 951; *United States v. Dyba,* 554 F.2d 417, 421 (10th Cir.), *cert. denied,* 434 U.S. 830 (1977). Here, we have little idea what the district court said, and appellants have not complied with Fed. R. App. P. 10(c), which allows for a statement to be prepared by the parties and approved by the district court, in lieu of the transcript. *See* 9 J. Moore, B. Ward & J. Lucas, Moore's Federal Practice ¶210.06[1] (1989); *Vaughn v. Britton,* 740 F.2d 833, 835-36 (11th Cir. 1984). We decline to review these comments, which we do not have, even for plain error. Appellants have made no effort to provide us with a statement envisioned by Fed. R. App. 10(c), and it is the responsibility of counsel, particularly when we have expressed our inability to proceed due to the lack of a record, to insure that a complete record is available for our review. *United States v. Hart,* 729 F.2d 662, 671 (10th Cir. 1984), *cert. denied,* 469 U.S. 1161 (1985).

Our previous judgment, 871 F.2d 902, is modified to reflect our supplemental opinion on rehearing. The judgments of conviction are

AFFIRMED.

Judge McKay joins in this supplemental opinion on rehearing except for the reaffirmance of the court's opinion, *Mobile Materials II,* 871 F.2d 902-919, insofar as that opinion is challenged by the dissent, 871 F.2d 919-924.

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF OKLAHOMA

Criminal No.

Filed:

Violations:

15 U.S.C. § 1
18 U.S.C. § 1001
18 U.S.C. § 1341

UNITED STATES OF AMERICA

VS.

MOBILE MATERIALS, INC.;
MOBILE MATERIALS COMPANY; and
GERALD O. PHILPOT,
Defendants.

INDICTMENT

The Grand Jury charges:

COUNT ONE

I

DEFINITIONS

1. As used herein, the term:

(a) "Highway construction" means the construction, reconstruction, building or rebuilding of public roads and turnpikes within the State of Oklahoma, including, but not limited to, the building

or construction of bridges, grade separation structures, concrete or asphalt paving, and the earth moving and culverting performed in connection therewith;

(b) "Highway construction contractor" means any business or legal entity engaged, directly or indirectly, in highway construction; and

(c) "Federal-Aid highway" means a public highway, the construction or reconstruction of which is partially financed by the federal government in accordance with the terms and conditions of Title 23 of the United States Code, Section 101 *et seq.*, commonly known as the Federal-Aid Highway Act.

II

DEFENDANTS

2. Mobile Materials, Inc. (also known as Mobil Materials, Inc.) is indicted and made a defendant herein. During the period covered by this indictment, Mobile Materials, Inc. was a corporation organized and existing under the laws of the State of Oklahoma with its principal place of business in Ada, Oklahoma. During the period covered by this indictment, Mobile Materials, Inc. engaged in the highway construction business in the State of Oklahoma.

3. Mobile Materials Company is indicted and made a defendant herein. Mobile Materials Company is a general partnership organized and existing under the laws of the State of Oklahoma and has its principal place of business in Ada, Oklahoma. During the period covered by this indictment, Mobile Materials Company engaged

in the highway construction business in the State of Oklahoma.

4. Gerald O. Philpot (also known as G. O. Philpot) is indicted and made a defendant herein. During the period covered by this indictment, Gerald O. Philpot was the President of Mobile Materials, Inc. and Managing Partner and President of Mobile Materials Company. During the period covered by this indictment, Gerald O. Philpot engaged in the highway construction business in the State of Oklahoma.

5. Whenever in this indictment reference is made to any act, deed, or transaction of any corporation or partnership, such allegation shall be deemed to mean that such corporation or partnership engaged in such act, deed, or transaction by or through its officers, directors, partners, agents, employees or representatives while they were actively engaged in the management, direction, control or transaction of its business or affairs.

III

CO-CONSPIRATORS

6. Various persons and firms, not made defendants herein, participated as co-conspirators in the offense charged herein and performed acts and made statements in furtherance thereof.

IV

TRADE AND COMMERCE

7. Highways in Oklahoma, including the highways and turnpikes which are the subject of this indictment, are part of a nationwide network of interconnecting high-

ways over which motor vehicles move in a continuous and uninterrupted stream of interstate commerce from and through one state to another. A substantial amount of the nation's population and goods moves in interstate commerce over these highways via motor vehicle transportation.

8. In the development of a nationwide network of interconnecting highways, the United States and the State of Oklahoma have cooperated in the financing and construction of highways in the State of Oklahoma. In this connection, within the period covered by this indictment, there was in existence a program for the development and improvement of highways financed and administered by the State of Oklahoma and the United States of America. This program was undertaken in accordance with the terms and conditions of Chapter 1 of Title 23 of the United States Code, Section 101 *et seq.*, commonly known as the Federal-Aid Highway Act. Under this program the United States of America, through its agency, the Federal Highway Administration, furnished and furnishes, in combination with the State of Oklahoma, through its Department of Transportation, the funds needed to pay the costs of certain program-related highway construction within the State of Oklahoma, including a portion of the highway construction which is the subject of this indictment.

9. During the period covered by this indictment, the Oklahoma Department of Transportation and the Oklahoma Turnpike Authority invited highway construction contractors to submit sealed competitive bids on highway construction projects. Invitations by the Oklahoma Department of Transportation are known as highway lettings

and customarily occur monthly in Oklahoma City, Oklahoma. Invitations by the Oklahoma Turnpike Authority are known as turnpike lettings and occur from time to time in Oklahoma City, Oklahoma. The Oklahoma Department of Transportation and the Oklahoma Turnpike Authority award contracts to the lowest responsible bidder following the opening of sealed bids.

10. During the period covered by this indictment, the Oklahoma Department of Transportation and Federal Highway Administration required each bidder on Federal-Aid highway construction projects to execute an affidavit, providing:

BIDDER'S AFFIDAVIT

> ....., of lawful age, being first duly sworn, on cath says, that (s)he is the agent authorized by the bidder to submit the attached bid. Affiant further states that the bidder has not been a part to any collusion among bidders in restraint of freedom of competition by agreement to bid at a fixed price or to refrain from bidding; or with any state official or employee as to quantity, quality or price in the prospective contract, or any other terms of said prospective contracts; or in any discussions between bidders and any state official concerning exchange of money or other thing of value for special consideration in the letting of a contract.

11. During the period covered by this indictment, there was in effect a State of Oklahoma law, the Public Competitive Bidding Act of 1974, which governed the award of highway construction projects by the Oklahoma Department of Transportation and the Oklahoma Turnpike Authority. That statute provided in part:

§ 103. Competitive bidding required

All public construction contracts shall be let and awarded to the lowest responsible bidder, by free and open competitive bidding after solicitation for sealed bids, in accordance with the provisions of this act. No work shall be commenced until a written contract is executed and all required bonds and insurance have been provided by the contractor to the awarding public agency.

The Oklahoma Department of Transportation further required that each bidder on highway projects be governed by its 1976 Standard Specifications for Highway Construction, which provided in part:

102.14. DISQUALIFICATION OF BIDDERS. Any one or more of the following causes may be considered as sufficient for the disqualification of a bidder and the rejection of his bid or bids:

* * *

Evidence of collusion among bidders. Participants in such collusion will receive no recognition as bidders for any future work of the Department.

The Oklahoma Turnpike Authority required that each bidder on turnpike projects be governed by its 1955 Standard Specifications for the Construction of the Oklahoma Turnpikes, which provided in part:

102.15. DISQUALIFICATION OF BIDDERS. Any one or more of the following causes may be considered as sufficient for the disqualification of a bidder and the rejection of his bid or bids:

* * *

Evidence of collusion among bidders.

12. During the period covered by this indictment, there was a substantial, continuous and uninterrupted flow of equipment and other essential materials from suppliers and manufacturers outside of the State of Oklahoma for sale to highway construction contractors in Oklahoma for use in the construction of highways, including the highway construction that is the subject of this indictment.

13. The activities of the defendants and co-conspirators that are the subject of this indictment were within the flow of, and substantially affected, interstate commerce.

V

OFFENSE CHARGED

14. Beginning at least as early as July 1978, and continuing thereafter at least through February 1982, the exact dates being unknown to the Grand Jury, the defendants and co-conspirators engaged in a combination and conspiracy in unreasonable restraint of the aforesaid interstate trade and commerce in violation of Section 1 of the Sherman Act (15 U.S.C. Section 1).

15. The aforesaid combination and conspiracy consisted of an agreement, understanding, and concert of action among the defendants and co-conspirators, a substantial term of which was to submit collusive, noncompetitive, and rigged bids to, or to withhold bids from, the Oklahoma Department of Transportation and the Oklahoma Turnpike Authority for the award of highway construction projects, some of which were federally funded.

16. For the purpose of forming and effectuating the aforesaid combination and conspiracy, the defendants and

co-conspirators did those things which they combined and conspired to do, including:

(a) Discussing the submission of prospective bids on highway construction projects in Oklahoma;

(b) Agreeing upon the successful low bidder on highway construction projects in Oklahoma;

(c) Submitting intentionally high, noncompetitive bids, or withholding bids, on highway construction projects in Oklahoma; and

(d) Submitting bid proposals on highway construction projects in Oklahoma containing false, fictitious and fraudulent statements and entries.

VI

EFFECTS

17. The aforesaid combination and conspiracy had the following effects, among others:

(a) Prices for Oklahoma highway construction projects were fixed and established at artificial and noncompetitive levels;

(b) Competition for the award of Oklahoma highway construction projects was restrained, suppressed, and eliminated;

(c) The State of Oklahoma was denied the right to receive competitive bids for highway construction projects; and

(d) The State of Oklahoma and and the United States of America were denied the benefits of free and open competition for the award of highway construction projects.

VII

JURISDICTION AND VENUE

18. The aforesaid combination and conspiracy was formed and carried out, in part, within the Western District of Oklahoma within the five years preceding the return of this indictment.

COUNTS TWO AND THREE

The Grand Jury further charges:

1. Each and every allegation contained in paragraphs 1 and 2, 4 and 5, and 8 through 11 of Count One of this indictment is realleged with the same force and effect as though each such paragraph was set forth in full detail herein.

2. On or about the dates specified below, in the Western District of Oklahoma, Mobile Materials, Inc. and Gerald O. Philpot, defendants herein, willfully and knowingly made and caused to be made false, fictitious and fraudulent statements as to material facts in matters within the jurisdiction of the United States Department of Transportation, Federal Highway Administration, an agency of the United States, in affidavits submitted to the Oklahoma Department of Transportation as part of Mobile Materials, Inc.'s bid proposals on the Federal-Aid highway construction projects specified below in which the defendants stated and represented that:

> G. O. Philpot, of lawful age, being first duly sworn, on oath says, that (s)he is the agent authorized by the bidder to submit the attached bid. Affiant further states that the bidder has not been a part to any collusion among bidders in restraint of freedom of competition by agreement to bid at a fixed price

or to refrain from bidding; or with any state official or employee as to quantity, quality or price in the prospective contract, or any other terms of said prospective contract; or in any discussions between bidders and any state official concerning exchange of money or other thing of value for special consideration in the letting of a contract.

when in truth and in fact, as the defendants then knew, Mobile Materials, Inc. and Gerald O. Philpot had participated in collusion in connection with the bid proposals for said Federal-Aid highway construction projects, each in violation of Title 18, United States Code, Section 1001:

Count	Date of Submission	Federal-Aid Project Number
2	October 26, 1979	F-91(15)
3	March 28, 1980	F-236(11)

COUNTS FOUR AND FIVE

The Grand Jury further charges:

1. Each and every allegation contained in paragraphs 1(a) and (b), 3 through 5, and 8 through 11 of Count One of this indictment is realleged with the same force and effect as though each such paragraph was set forth in full detail herein.

2. Beginning at least as early as July 1978, and continuing thereafter, the exact dates being unknown to the Grand Jury, in the Western District of Oklahoma and elsewhere, the defendants and others, known and unknown, devised and intended to devise a scheme and artifice to defraud the State of Oklahoma of:

(a) Money;

(b) Its mandated right to open and free competition in the awarding of contracts for highway construction; and

(c) Its right to have its programs for the development and improvement of highways conducted honestly, fairly, and free from craft, trickery, deceit, corruption, dishonesty, and fraud.

3. It was part of the aforesaid scheme and artifice to defraud that:

(a) The successful low bidders would be and were agreed upon for highway construction projects SAP-63(126) and SAP-67(83), let on December 21, 1978;

(b) Mobile Materials Company would be and was the low bidder for highway construction project SAP-67(83); and

(c) Collusive, noncompetitive and rigged bids would be and were submitted to the Oklahoma Department of Transportation in connection with the letting of the aforesaid highway construction projects.

4. On or about the dates of mailing listed below, in the Western District of Oklahoma and elsewhere, the defendants and others, for the purpose of executing and carrying out the said scheme and artifice to defraud, and attempting to do so, did knowingly cause the warrants for payment listed below to be placed in the mails by the Oklahoma Department of Transportation for delivery by the United States Postal Service, according to the directions thereon, each such use of the mails being a

separate Count of this indictment and each constituting a separate violation of Title 18, United States Code, Section 1341:

Count	Sender	Addressee	Warrant No. and Amount	Approximate Date of Mailing
4	ACCOUNTS & BUDGET BRANCH 200 N.E. 21st Street Oklahoma City, Oklahoma 73105	Mobile Materials Company P.O. Box 1606 Ada, OK 74820	335704 $347,964.34	12/03/79
5	ACCOUNTS & BUDGET BRANCH 200 N.E. 21st Street Oklahoma City, Oklahoma 73105	Mobile Materials Company P.O. Box 1606 Ada, OK 74820	354330 $114,491.61	12/12/79

COUNTS SIX AND SEVEN

The Grand Jury further charges:

1. Each and every allegation contained in paragraphs 1 and 2, 4 and 5, and 8 through 11 of Count One of this indictment is realleged with the same force and effect as though each such paragraph was set forth in full detail herein.

2. Beginning at least as early as July 1978, and continuing thereafter, the exact dates being unknown to the Grand Jury, in the Western District of Oklahoma and elsewhere, the defendants and others, known and unknown, devised and intended to devise a scheme and artifice to defraud the State of Oklahoma and the United States of America of:

(a) Money;

(b) Their mandated right to open and free competition in the awarding of contracts for highway construction; and

(c) Their right to have their programs for the development and improvement of highways conducted honestly, fairly, and free from craft, trickery, deceit, corruption, dishonesty, and fraud.

3. It was part of the aforesaid scheme and artifice to defraud that:

(a) The successful low bidder would be and was agreed upon for Federal-Aid Project F-236(11), let on March 28, 1980;

(b) Mobile Materials, Inc. would be and was the low bidder for Federal-Aid Project F-236(11); and

(c) Collusive, noncompetitive and rigged bids would be and were submitted to the Oklahoma Department of Transportation in connection with the letting of the aforesaid Federal-Aid highway construction project.

4. On or about the dates of mailing listed below, in the Western District of Oklahoma and elsewhere, the defendants and others, for the purpose of executing and carrying out the said scheme and artifice to defraud, and attempting to do so, did knowingly cause the warrants for payment listed below to be placed in the mails by the Oklahoma Department of Transportation for delivery by the United States Postal Service, according to the directions thereon, each such use of the mails being a separate Count of this indictment and each constituting a separate violation of Title 18, United States Code, Section 1341:

Count	Sender	Addressee	Warrant No. and Amount	Approximate Date of Mailing
6	ACCOUNTS & BUDGET BRANCH 200 N.E. 21st Street Oklahoma City, Oklahoma 73105	Mobil Materials, Inc. P.O. Box 1606 Ada, Ok. 74830	553306 $ 65,879.10	04/08/81
7	ACCOUNTS & BUDGET BRANCH 200 N.E. 21st Street Oklahoma City, Oklahoma 73105	Mobil Materials, Inc. P.O. Box 1606 Ada, Oklahoma 74820	860304 $ 53,363.12	08/12/81

DATED:
/s/ J. Paul McGrath
J. Paul McGrath
Assistant Attorney General
/s/ Joseph H. Widmar
Joseph H. Widmar

.....

James A. Backstrom, Jr.
Attorneys
U.S. Department of Justice
Antitrust Division
/s/ William S. Price
William S. Price
United States Attorney

A TRUE BILL

.....

Foreman
/s/ Alan A. Pason
Alan A. Pason
/s/ Laurence K. Gustafson
Laurence K. Gustafson
/s/ James F. Adams
James F. Adams
Attorneys
U.S. Department of Justice
Antitrust Division
1100 Commerce St.,
Suite 8C6
Dallas, Texas 75242
(214) 767-8051

(Dated September 11, 1984)

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF OKLAHOMA

CRIMINAL NO. CR-84-147-E

UNITED STATES OF AMERICA,

VS.

MOBILE MATERIALS, INC.;
MOBILE MATERIALS COMPANY; and
GERALD O. PHILPOT,
Defendants.

GOVERNMENT'S VOLUNTARY BILL OF PARTICULARS

The United States of America, through its attorneys, provides the following:

The Grand Jury for the Western District of Oklahoma, in the Indictment in this case, has charged Defendants Mobile Materials, Inc., Mobile Materials Company and Gerald O. Philpot with participating in a combination and conspiracy "to submit collusive, non-competitive and rigged bids to, or to withhold bids from, the Oklahoma Department of Transportation for the award of highway construction projects." Indictment Count One ¶ 15. The aforesaid combination and conspiracy was part of a single, continuing conspiracy that existed in Oklahoma at least as early as July 1978.

The government does not contend, and the Indictment does not charge, that all highway construction projects let by the Oklahoma Department of Transportation were the subjects of collusive bidding. Nor were the conspirators always successful in their attempts to rig the bidding on certain highway construction projects. Nevertheless, in the words of the Tenth Circuit in *United States v. Beachner Construction Co., Inc.*, 729 F.2d 1278, 1282 (1984), the "bid-rigging scheme . . . could be plugged into at anytime." Thus, for certain highway construction projects, the conspirators could "plug into" the established scheme to eliminate price competition. The Defendants' and co-conspirators' participation in this scheme will be shown by testimony and other evidence about the highway construction projects listed in Exhibit A. The co-conspirators listed in Exhibit B participated in this scheme.

Respectfully submitted,

/s/ Alan A. Pason
Alan A. Pason

/s/ Laurence K. Gustafson
Laurence K. Gustafson

/s/ James F. Adams
James F. Adams
Attorneys
U.S. Department of Justice
Antitrust Division
1100 Commerce Street, Rm. 8C6
Dallas, Texas 75242
(214) 767-8051

Project	Description
DP-M-5441(015)	1.458 Mi. Gr. Dr. Asph. & Conc. Surf., beginning at McArthur Street and extending north to the I-40 Interchange on Kickapoo Street North of Shawnee, in Pottawatomie County.
SAP-67(83)	7.797 Mi. Asph. Conc. Surf., beginning at north edge of Seminole and extending north to I-40, in Seminole County (SH-99).
SAP-63(126)	5.330 Mi. Widen and Resurf. w/Asph. Conc. and Br. Modification 0.030 Mi., beginning approximately 1 Mile southeast of Earlsboro and extending east, in Pottawatomie County (US-270 & SH-9).
SAP-10(133) SAP-69(91)	8.954 Mi. Surf. & Erosion Control, beginning at Velma and extending east into Ratliff City, in Stephens and Carter Counties (SH-7).

EXHIBIT "A"

id Opening Date	Bidders	Amount of Bid
uly 28, 1978	Amis Construction Company	$1,965,248.75
	Mobile Materials, Inc.	2,017,590.09
	South Prairie Construction Co.	2,079,634.60
ecember 21, 1978	Mobile Materials Company	$1,588,201.64
	South Prairie Construction Co.	1,651,005.70
	Glover Construction Co., Inc.	1,663,543.40
ecember 21, 1978	Amis Construction Company	$1,487,647.02
	Mobile Materials Company	1,498,380.39
	South Prairie Construction Co.	1,503,610.70
	Glover Construction Co., Inc.	1,571,689.65
une 22, 1979	Broce Construction Co. of Oklahoma, Inc.	$3,977,854.04
	South Prairie Construction Co.	4,003,622.50
	Cornell Construction Co., Inc.	4,168,177.94

Project	Description
WR-MC-18	Pavement milling and asph. conc. pavement resurf. 42.0 mi. 24' pavement and partial width of shoulder. Mile 24.8 to mile 46.9 in Mayes and Craig Counties, Oklahoma, on the Will Rogers Turnpike.
IR-35-4(103) 193 Part 1	5.888 Mi. Resurf. with Asph. Conc. Type "C," beginning 5 miles north of Perry and extending north, in Noble County (I-35).
IR-35-4(103) 193 Part 2	5.092 Mi. Resurf. with Asph. Conc. Type "C," beginning 10.888 miles north of Perry and extending north to SH-15, in Noble County (I-35).

Bid Opening Date	Bidders	Amount of Bid
July 12, 1979	South Prairie Construction Co.	$3,727,555.00
	Broce Construction Co. of Oklahoma, Inc.	3,898,365.00
September 21, 1979	South Prairie Construction Co.	$2,388,729.10
	Evans & Associates Construction Co., Inc.	2,423,477.83
	Cummins Construction Company, Inc.	2,500,807.53
	Broce Construction Co. of Oklahoma, Inc.	2,589,410.32
September 21, 1979	Broce Construction Co. of Oklahoma, Inc.	$2,018,766.74
	Cummins Construction Company, Inc.	2,051,572.39
	South Prairie Construction Co.	2,053,582.90
	Evans & Associates Construction Co., Inc.	2,071,603.86

Project	Description
IR-35-4(103) 193 PTS 1 & 2	10.980 Mi. Resurf. with Asph. Conc. Type "C," beginning 5 mile north of Perry and ex tending north to SH-1 in Noble County (I-35
F-91(15)	6.848 Mi. Surf., Asph Conc. Type "C" & 1 RC 0.004 Mi., from Davis east to Sulphur, in Murray County (SH-7).
F-236(11)	3.156 Mi. surfacing, beginning at the junc tion of SH-1 and SH-3 and extending south- east 3.156 miles to t junction of SH-3E and SH-99, in Pontotoc County (SH-3W).
SAP-67(109)	0.850 Mi. 2" HMHL Asp Conc. Type "C" (27' Wide 0.850 Mi.) Begin ning at the intersec- tion of Main and Stro thers Street in Semin and extending east to Harvey Road, in Semin County

Bid Opening Date	Bidders	Amount of Bid
September 21, 1979	South Prairie Construction Co.	$4,442,312.00
	Evans & Associates Construction Co., Inc.	4,495,081.69
	Cummins Construction Company, Inc.	4,552,379.92
	Broce Construction Co. of Oklahoma, Inc.	4,608,177.06
October 26, 1979	Broce Construction Co. of Oklahoma, Inc.	$5,377,568.64
	Mobile Materials, Inc.	5,395,752.05
	Washita Construction Company	5,502,340.60
March 28, 1980	Mobile Materials, Inc.	$4,425,397.11
	Frascon, Inc.	4,606,541.50
	Nineteenth Seed Company	4,736,086.00
July 25, 1980	Mobile Materials, Inc.	$ 72,500.00
	Shawnee Paving Co.	74,850.00

EXHIBIT "B"

Co-Conspirator Companies	Co-Conspirator Individuals
Amis Construction Company 1647 Exchange Avenue Oklahoma City, Oklahoma 73101	W. D. (Dave) Amis, Jr.
Broce Construction Co. of Oklahoma, Inc. 815 Cedar Street Woodward, Oklahoma 73801	Ray C. Broce Milton S. (Sam) Beyer Everett A. "Doc" Taylor A. A. "Bud" Vance, Jr.
Cherokee Paving Company 314 South Broadway, Suite 112 Ada, Oklahoma 74820	Stuart M. Ronald
Cornell Construction Co., Inc. P.O. Box 189 Clinton, Oklahoma 73601	John L. Cornell
Cummins Construction Company, Inc. 1420 West Chestnut Enid, Oklahoma	
Evans & Associates Construction Co., Inc. 3320 North 14th Street Ponca City, Oklahoma 74601	Lloyd I. (Jerry) Evans
Frascon, Inc. 101 N.E. 20th Street Lawton, Oklahoma 73502	James F. Freeman

Glover Construction Co., Inc. Shady Point P.O. Box 878 Poteau, Oklahoma	George Paul Glover
McConnell Construction, Inc. 5020 Northwest 16th Street Oklahoma City, Oklahoma 73127	John C. McConnell
Shawnee Paving Co. 122 North Bell Shawnee, Oklahoma 74801	Don W. Hurst
South Prairie Construction Co. 8412 S.W. 8th Street Oklahoma City, Oklahoma	Carl W. (Bill) Foster Kenneth W. Jacobs James B. Baldwin
Washita Construction Company Highway 142 By-Pass Ardmore, Oklahoma	Billy Ray Anthony

(Certificate of Service Omitted in Printing)

(Dated October 2, 1984)

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF OKLAHOMA

CRIMINAL NO. CR-84-147-E

UNITED STATES OF AMERICA,

VS.

MOBILE MATERIALS, INC.;
MOBILE MATERIALS COMPANY; and
GERALD O. PHILPOT,
Defendants.

GOVERNMENT'S AMENDMENT TO VOLUNTARY BILL OF PARTICULARS

The United States of America, through its attorneys, hereby amends its Voluntary Bill of Particulars by adding the following person as a co-conspirator:

Floyd J. Freeman (Frascon, Inc.)

Respectfully submitted,

/s/ Alan A. Pason
Alan A. Pason
/s/ Laurence K. Gustafson
Laurence K. Gustafson
/s/ James F. Adams
James F. Adams
Attorneys
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Dallas, Texas 75242
(214) 767-8051

(Certificate of Service Omitted in Printing)

(Dated January 21, 1986)

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF OKLAHOMA

CRIMINAL NO. CR-84-147-E

UNITED STATES OF AMERICA,

VS.

MOBILE MATERIALS, INC.;
MOBILE MATERIALS COMPANY; and
GERALD O. PHILPOT,
Defendants.

GOVERNMENT'S SECOND AMENDED BILL OF PARTICULARS

The United States of America, through its attorneys, amends its Voluntary Bill of Particulars as follows:

1. Exhibit A of the Government's Voluntary Bill of Particulars is amended to delete construction project number DP-M-5441(015) bid on July 28, 1978.

2. The government plans to introduce evidence at trial about the following construction projects (listed in Exhibit A of the Government's Voluntary Bill of Particulars) to show the Defendants' participation in a conspiracy to submit collusive, non-competitive and rigged bids to, or to withhold bids from, the Oklahoma Department of Transportation and the Oklahoma Turnpike Authority for the award of highway construction projects:

Project	Date
SAP-67(83)	December 21, 1978
SAP-63(126)	December 21, 1978
WR-MC-18	July 12, 1979
F-91(15)	October 26, 1979
F-236(11)	March 28, 1980
SAP-67(109)	July 25, 1980

3. The following construction projects listed in Exhibit A of the Government's Voluntary Bill of Particulars are likely to be mentioned during the witnesses' testimony as part of the witnesses' explanation of their participation in the conspiracy:

Project	Date
SAP-10(133) and SAP-69(91)	June 22, 1979
IR-35-4(103)193 Part 1	September 21, 1979
IR-35-4(103)193 Part 2	September 21, 1979
IR-35-4(103)193 Parts 1 & 2	September 21, 1979

Respectfully submitted,

/s/ Laurence K. Gustafson
Laurence K. Gustafson
/s/ Kent A. Gardiner
Kent A. Gardiner
Attorneys
U.S. Department of Justice
Antitrust Division
1100 Commerce St., Rm. 8C6
Dallas, TX 75242
(214) 767-8051

(Certificate of Service Omitted in Printing)

(Filed May 8, 1986)

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF OKLAHOMA

Docket No. CR-84-147-E

United States of America,

vs.

GERALD O. PHILPOT,
Defendant.

JUDGMENT AND PROBATION/COMMITMENT ORDER

In the presence of the attorney for the government the defendant appeared in person on this date [May 8, 1986].

* * *

[x] WITH COUNSEL [Mack Braly - Retained].

* * * [x] NOT GUILTY.

There being a verdict of [x] GUILTY.

Defendant has been convicted as charged of the offense(s) of violation of Title 15 U.S.C. Section 1 and Title 18 U.S.C. Section 1001 (conspiracy in unreasonable restraint of interstate trade and commerce (Sherman Act) & false & fraudulent statement in a matter within jurisdiction of U. S. Department of Transportation, Federal Highway Adm) as charged in Counts 1 and 3 of the Indictment.

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that, the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of three (3) years on each of Counts 1 and 3 of the Indictment, or until the defendant is otherwise discharged as provided by law. IT IS FURTHER ORDERED that the confinement imposed in Count 3 shall run concurrent with the sentence imposed in Count 1. IT IS FURTHER ORDERED that the defendant pay a fine unto the United States in the amount of $100,000.00 on Count 1 and $10,000.00 on Count 3 of the Indictment. IT IS FURTHER ORDERED that upon a jury finding of not guilty thereon the defendant be acquitted and discharged as to Counts 2 and 4 thru 7. IT IS FURTHER ORDERED that the appeal bond be fixed in the amount of $15,000.00 to be posted within 10 days cash or surety.

Filed: May 8, 1986

Robert D. Dennis, Clerk
By /s/ (Illegible)

* * *

/s/ Luther B. Eubanks
Luther B. Eubanks

Date 5-8-86

(Filed May 8, 1986)

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF OKLAHOMA

Docket No. Cr-84-147-E

United States of America,

vs.

MOBILE MATERIAL INC.,
Defendant.

JUDGMENT AND PROBATION/COMMITMENT ORDER

In the presence of the attorney for the government the defendant appeared in person on this date [May 8, 1986].

* * *

[x] WITH COUNSEL [Mack Braly - Retained].

* * * [x] NOT GUILTY.

There being a verdict of [x] GUILTY.

Defendant has been convicted as charged of the offense(s) of violation of Title 15 U.S.C. Section 1 and Title 18 U.S.C. Section 1001 (conspiracy in unreasonable restraint of interstate trade and commerce (Sherman Act) & false & fraudulent statement in a matter within jurisdiction of U. S. Department of Transportation, Federal Highway Adm.) as charged in Counts 1 and 3 of the Indictment.

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that, IT IS ORDERED that the defendant pay a fine unto the United States in the amount of $500,000.00 on Count 1 and $10,000.00 on Count 3 of the Indictment. IT IS FURTHER ORDERED that upon a jury finding of not guilty thereon the defendant be acquitted and discharged as to Counts 2, 4 thru 7.

Filed: May 8, 1986

Robert D. Dennis, Clerk
By /s/ (Illegible)
Deputy

* * *

/s/ Luther B. Eubanks
Luther B. Eubanks

Date 5-8-86

(November 29, 1984)

IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF OKLAHOMA

Case No. CR-84-147-E

UNITED STATES OF AMERICA,
Plaintiff,

vs.

GERALD O. PHILPOT,
Defendant.

OFFICIAL COURT REPORTER'S TRANSCRIPT OF PROCEEDINGS HAD ON NOVEMBER 29, 1984

BEFORE THE HONORABLE LUTHER B. EUBANKS IN OKLAHOMA CITY, OKLAHOMA

APPEARANCES

Judge Presiding:

The Honorable Luther B. Eubanks
United States District Judge
Federal Courthouse Building
Oklahoma City, Oklahoma 73102

For the Plaintiff:

Mr. Alan Pason and
Mr. Laurence Gustafson
U. S. Department of Justice
Antitrust Division
1100 Commerce Street, Suite 8C6
Dallas, Texas 75242

For the Defendant:

Mr. Mack Braly
Mack Muratet Braly & Associates
1516 S. Boston, Suite 320
Tulsa, Oklahoma 74119

Reported by:

Vicki Dilbeck, C.S.R., C.P., C.M.
Official Court Reporter
Room 3011-A, U. S. Courthouse
Oklahoma City, Oklahoma 73102
(405) 232-2804

* * *

* * * [7] they're coming in and they're charging or going to try and prove because they named in the Bill of Particulars some specific jobs, they're going to try and put on evidence of ambiguous acts and ambiguous conduct from which a jury could conclude that that particular job was rigged. But then they're going to ask the jury to infer this single overall conspiracy whether or not they prove or even are able to get to the jury on every one of the twelve jobs that they have alleged in the Bill of Particulars.

Now, I am submitting to the Court, and I humbly request that the Court consider this question, that if

they're going to try and prove an overall conspiracy, we ought to be told when that conspiracy began, who was responsible for running it, who the other conspirators are, how we joined that conspiracy. I don't mean how we set up to rig some specific job.

The government wants to prove their whole case by proving a specific or several specific jobs. But I'm talking about this single overall conspiracy that they're trying to bring this whole thing into this umbrella of.

THE COURT: You mentioned a Bill of Particulars. Have they supplied you with a Bill of Particulars?

MR. BRALY: They have supplied us with a Bill of Particulars.

THE COURT: Supplying the names of the alleged [8] co-conspirators.

MR. BRALY: They have supplied a Bill of Particulars naming some of the alleged co-conspirators, but they do not—

THE COURT: Well, that's done many times and then maybe with the grandmother clause and other persons and entities to the Grand Jury unknown.

MR. BRALY: They have supplied us with the conspirators—

THE COURT: Now, they have given you then, you've got, although the indictment is silent, you've got a Bill of Particulars showing who it is claimed you conspired with.

Now, do they also tell you on which projects and which jobs?

MR. BRALY: They name specific projects, yes, sir, in the Bill of Particulars. But, your Honor, they do not say anything at all about this overall conspiracy, either in the Bill of Particulars or the indictment. Moreover, neither the government nor we are in dispute about one point, and that is that under *Russell vs. United States*, your Honor, you cannot cure a defective indictment by a Bill of Particulars.

THE COURT: Well, you lost me somewhere, Mr. Braly. Where would that be to your detriment to allege you're a member of an overall conspiracy? I think it would be to your advantage rather than your detriment if they say you were only implicated in part, that you were only connected with [9] these particular projects.

MR. BRALY: Because, your Honor, they can, by linking all of this together in this overall conspiracy, having produced even enough evidence to link us to one conspiracy, they can then bring in co-conspirator testimony, co-conspirator hearsay as to any other possible job within the five-year period and introduce that to prove that we were part of some other conspiracy, even if the two jobs themselves are in no way linked.

It's the linkage between these jobs that is not being shown.

THE COURT: No, they can't do that. They can't do that. I won't let them. Now if you properly stated the law, they can link them. Certainly I'll allow it.

MR. BRALY: Certainly.

THE COURT: Because, as I understand the law, if I join an ongoing conspiracy, even though it's been going on for years and years and about over, I seem

to buy in like a partner to everything that's gone on before me.

MR. BRALY: That's the law, your Honor.

THE COURT: So if they cannot link the two, assuming that there's two conspiracies, there's a small one that deals with a certain project but then there's another one that deals with the overall picture, we'll just rip the public off on every project everytime, and your client is not shown to be [10] connected with that one or they cannot link the two, I won't let them put on the evidence, Mr. Braly.

MR. BRALY: Judge Eubanks, the government doesn't allege that every job that was let during the five-year period was rigged. It doesn't even allege that every job that Philpot bid on was rigged. But it's picked out certain selected jobs and said that every time a job was rigged, it was part of the overall conspiracy. But there is no information in the indictment, in Count One of the indictment, to tell us anything about that overall conspiracy. We're just—

THE COURT: Well, I understand that, but that's supplied by the Bill of Particulars.

MR. BRALY: No, sir. All that's supplied in the Bill of Particulars is that there were certain specific jobs that we participated in rigging with certain specific individuals. But there is nothing said about where the conspiracy, the overall single conspiracy, came from.

THE COURT: Well, that's where I get lost. What is the difference now and how can you tell, by reading the indictment in its entirety, all the counts, whether the government claims there are two conspiracies, one overall and then a small one within the overall?

MR. BRALY: I don't think that's the government's claim, your Honor.

THE COURT: Well, where do you get the idea that [11] there is an overall conspiracy?

MR. BRALY: They stood right here in this Court and said so in the first hearing we had, your Honor. This very question came up. They have said so in everything that's—

THE COURT: I'm sure you remember correctly. I didn't remember that.

MR. BRALY: Your Honor, they told us this when they filed it. This is why they filed it this way, with a single count alleging violation of the Sherman Act with no particulars. And then come in and add the particulars, add the details of the jobs by the Bill of Particulars, because by alleging this single Sherman Act count rather than a separate violation of the Sherman Act for each job or group of jobs that we're alleged to have rigged, they have avoided or think that they're avoiding this problem they encountered in the District of Kansas.

THE COURT: Let me hear from them, and then I'll probably hear from you further. What about it, Gentlemen? And if you don't mind, would you direct first, Mr. Pason, this argument that there's actually two conspiracies, one overall and then a group of small ones that may be, although not linked, kind of go together to make up the whole, or whatever.

MR. PASON: No, your Honor, the government's indictment charges a single conspiracy to rig bids on Oklahoma [12] highway projects, not in conspiracy to

rig bids on particular highway projects, but a conspiracy to rig bids as the desire to do so on highway projects.

Now, the government has also stated that very succinctly—

THE COURT: What did you—

MR. PASON: —in its voluntary bill.

THE COURT: Let me—of course, I accept your word. I hadn't read it that carefully. But now, what do you recall about oral statements here in open Court, and frankly I have no memory of it, but what do you recall that you said here that might indicate that the government takes the position that there are several conspiracies, one giant overall one and then—

MR. PASON: Nothing, your Honor, that I can recall. We've always—the indictment by its terms charges a single continuing conspiracy from a period stated July—

THE COURT: Well, let me get his exact words. I'm sorry. I may have misquoted him.

MR. BRALY: No, your Honor. What Mr. Pason is saying now is what I heard them say in open Court before. There is a single conspiracy of which the individual jobs that they have named in the Bill of Particulars are a part.

THE COURT: Yeah.

MR. BRALY: I did not understand the government to [13] be talking about two conspiracies with several—

THE COURT: I'm sorry. I misunderstood you and I was misquoting you. Thank you. Now, you go ahead.

MR. PASON: All right, your Honor. To address some of the points. Now, I think we took from Mr. Braly's motion that his essential complaint about our indictment was that it lacked evidentiary detail. But as our authorities and our memoranda state fairly clearly, that the pleading of evidentiary detail in a conspiracy indictment is never required, and particularly in a Sherman Act indictment where overt acts are not essential elements of the crime.

And we have described in the indictment in general terms, more than in the words of the statute, the time of the conspiracy, where it happened, and how it was conducted. It's not necessary to plead the names of co-conspirators. However, in our voluntary Bill of Particulars, we have identified the co-conspirators relevant to the jobs that are also identified in the Bill of Particulars. And those jobs are jobs about which the government will introduce evidence to show that there was an agreement to rig bids on highway projects in Oklahoma.

Your Honor, we would also add that our method of pleading in this indictment is not a radical departure from the way the Antitrust Division has pled indictments in general conspiracy cases in the past.

[14] The indictment to which Mr. Braly refers, the Cavanaugh Indictment which I believe you're familiar, was a specific—

THE COURT: No, I'm not. That wasn't my case. But he referred to some Kansas indictments.

MR. PASON: The *Beachner* case was a different kind of situation, your Honor. I think it supports the government's pleading of the case in this matter because

we don't contend in the indictment that all the jobs in Oklahoma were rigged.

In fact, the Tenth Circuit, in its opinion in the *Beachner* case, cited that the conspiracy in Kansas, probably eighty percent of the jobs were not rigged, too.

Our method of pleading this goes with the facts as we see it, related to multiple transactions or instances of collusive bidding in Oklahoma. The government has done that in the past and continues to do it in other cases where appropriate.

In the case of *United States vs. Metropolitan Enterprises and Dan Cavenaugh,* [sic] the government pleaded a specific conspiracy to rig specific jobs, and that was the content of the evidence and the content of the government's case.

We also understand, your Honor, that at trial our case in chief will be limited to introducing evidence about the jobs which we identified in the Bill of Particulars.

* * *

[17] At trial the government said, well, we're going to set aside the setting-up of the burglary. There was still an insurance scheme but it didn't have anything to do with setting-up the burglary. And the Ninth Circuit said no, you indicted him on setting up a burglary and carrying out an insurance scheme, you can't narrow it like that.

Well, unless the government is intending to prove every one of these twelve jobs that they have alleged we rigged, and their proof will be fatally defective if they don't prove all twelve of them, then this indictment charging a single overall conspiracy is defective.

And if that is their intent, we submit that it should be in Count One of the indictment and not buried over in a Bill of Particulars, because the Supreme Court of the United States in *United States vs. Russell* said very clearly, and said it very emphatically, you can't cure a defective indictment by a Bill of Particulars.

The reason for that is that it's the Grand Jury that indicts, not the Antitrust Division.

So, your Honor, with the Court's permission, I have pulled some of these points that I'm making together into a reply, which I had not filed a reply to the government's brief to their response brief, and I would ask permission if the Court would allow me to hand that reply brief up.

THE COURT: You certainly may. But I believe I'm [18] ready to rule now. But for the record, you supply the reply, and I appreciate the motion. You've educated me what to look for. But I don't find any trouble with this indictment.

The big trouble that I'm going to have is deciding what proof to allow in the case because they have alleged one single conspiracy, and I think has properly done so since the Bill of Particulars has been supplied. I'm inclined to believe that the original indictment may have been defective, absent the supplying of the names of the alleged co-conspirators and in some particularity the objects of the conspiracy. But that's behind us now. You have supplied that by a Bill of Particulars.

And it's for me to look at the evidence carefully if the case comes back. This one is going to the Circuit and may never come back, may dismiss it outright or whatever. But it's for me to see if there is indeed

a different conspiracy or multitude of them and to protect the rights of the accused to be sure that evidence is allowed only with respect to that conspiracy, that the government is able to show that he is connected with, or that he joined. And I will do so.

MR. BRALY: May I file and hand up my brief?

THE COURT: Yes. I'll tell you what you might do now. I've signed an order, I believe, with respect to the dismissal of the dissolved corporate entities and partnership. I would appreciate it, if you would like, to prepare a [19] supplemental order on this so that you might have an interlocutory appeal for my ruling just made, if you'd like.

MR. BRALY: I would, your Honor. But may I respectfully ask the Court—

THE COURT: I would be happy to grant it because if the Circuit can do a lot of my work for me out there and if I have to try it tell me how to try it, I would appreciate it.

MR. BRALY: Your Honor, may I respectfully request that the Court take a look at the reply brief before the ruling is set in concrete. I appreciate that the Court feels—

THE COURT: All right. That's my feeling today. I reserve the right to revise it if after having reviewed your reply brief I believe I should. Sure.

The effective date then, if the order is finalized, would be when it's signed and not today, and retract what I've said insofar as it may be construed as a final ruling in the matter.

MR. PASON: Your Honor.

THE COURT: Sure. Yes.

MR. PASON: May I just add that we still stand by our initial contention as set forth in our brief that the indictment as pled was sufficient and that the voluntary Bill of Particulars does further elaborate an otherwise sufficient indictment.

[20] THE COURT: Well, that may be. But it seems to me on the basic that if I'm accused of entering into a conspiracy, which I deny and the law presumes to be innocent, basic justice would entitle me to know with whom do you claim I conspired. And that's the reason that I would be inclined to follow Mr. Braly's argument. But you have supplied the information by way of a Bill of Particulars. So that's my feeling in the matter.

Thank you very much. And I'll get—when can you file it, Mr. Braly? The reply.

MR. BRALY: The reply, your Honor—

THE COURT: Oh, you just tendered it. Thank you. I'll work right on it then.

MR. BRALY: Thank you.

THE COURT: All right. Thank you, Gentlemen. You may be excused.

(Conclusion of proceedings.)

[21] CERTIFICATE

I, Vicki Dilbeck, C.S.R., C.P., C.M., an Official Court Reporter for the United States District Court for the Western District of Oklahoma, do hereby certify that the above and foregoing hearing was by me taken in shorthand and thereafter transcribed, and that it is accurate and correct, and that the same was taken on the 29th day of November, 1984, and that I am not attorney for or relative of either of said parties, or otherwise interested in the events of said action.

In witness whereof, I have hereunto set my hand, this 10th day of January, 1985.

/s/ Vicki Dilbeck
Vicki Dilbeck, C.S.R., C.P., C.M.
Official Court Reporter
U. S. District Court for the
Western District of Oklahoma

UNITED STATES DISTRICT COURT
Western District of Oklahoma

November 30, 1984

Chambers of
Luther B. Eubanks
Chief Judge

Oklahoma City 73102

Mr. William S. Price
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4434 U. S. Courthouse
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Mr. Laurence K. Gustafson
Mr. Alan Payson
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Antitrust Division
1100 Commerce Street
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Dallas, Texas 75242

Mr. Mack Muratet Braly
1516 South Boston Avenue
Suite 320
Tulsa, OK 74119

Re: CR-84-147-E
UNITED STATES OF AMERICA v.
GERALD O. PHILPOT

Gentlemen:

Since hearing arguments yesterday, I have read the Reply Brief submitted by defendant and am still of the opinion that the Indictment herein should not be dismissed for vagueness. The remarks I made from the bench yesterday explain the reason for my opinion, but

I also adopt the reasoning of Judge Russell entered in Case CIV-84-148-R, styled United States of America v. Cherokee Paving Company, et al., a copy of which I hereby make a part of my oral order by reference, as though submitted and filed of record at the time I made my oral announcement from the bench.

Yours very truly,

/s/ Luther B. Eubanks
Luther B. Eubanks

LBE/jj

(Filed October 29, 1984)

IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF OKLAHOMA

CR 84-148-R

UNITED STATES OF AMERICA,
Plaintiff,

-vs-

CHEROKEE PAVING COMPANY; AMIS CONSTRUCTION COMPANY; and STUART M. RONALD,
Defendants.

ORDER

The Defendants, Cherokee Paving Company, Amis Construction Company, and Stuart M. Ronald, have each filed a Motion to Dismiss the Indictment by reason of unconstitutional vagueness. Defendants Cherokee Paving and Stuart M. Ronald also allege the indictment fails to state a public offense. The Court will address the latter position first.

Cherokee and Ronald argue the indictment lacks sufficient allegations of intent. However, this Court is persuaded, and the Defendant's admit, the Tenth Circuit has recently denied a motion to dismiss on this ground while examining language identical to that in the instant indictment. *United States v. Metropolitan Enterprises, Inc.*, 728 F.2d 444 (10th Cir. 1984). Additionally, they contend the indictment fails to allege a public offense because it fails to allege the co-conspirators were com-

petitors. This Court has previously determined that co-conspirators need not be competitors. Thus, the Court denies the Motion to Dismiss on the grounds of failure to state a public offense.

As previously stated, all Defendants raise the issue of vagueness. All the parties agree as to the constitutional guarantees involved and the purposes they serve. This is, of course, where the agreement ends.

In determining the sufficiency of an indictment, the document is considered as a whole. *Frankfort Distilleries v. United States,* 144 F.2d 824 (10th Cir. 1984). In order to allege a violation of the Sherman Act, it is necessary that the Government "descend to particulars and allege the constituent ingredients of which the crime is composed." *Id.* at 830. In this regard, an examination of indictments upheld by the Tenth Circuit is particularly helpful.

In *Frankfort, supra,* the Court upheld an indictment very similar to the present indictment with the exception of the allegations regarding manner and means of the conspiracy. However, this elaboration in no way narrowed the time or place allegations. Indeed, Judge Phillips, in a forceful dissent, addressed the same issues raised by the Defendants herein. Consequently, there is no question that the Court, although divided, considered the nature of the difficulties a defendant encounters when certain specifics are not included in the indictment. *See also United States v. Armour,* 137 F.2d 269 (10th Cir. 1943).

After thorough comparison of the present indictment with those upheld in *Frankfort* and *Armour, supra,* the Court is persuaded that the "constituent ingredients" of

the present conspiracy have been alleged, and that the indictment is not unconstitutionally vague. However, the Government would be well advised to use the indictment in *United States v. Metropolitan Enterprises, Inc.*, 728 F.2d 444 (10th Cir. 1984), as a model from which to draft future indictments in bid rigging cases.

The Defendants' Motion to Dismiss the Indictment is denied.

IT IS SO ORDERED this 29 day of October, 1984.

/s/ David L. Russell
David L. Russell
United States District Judge

(Filed April 9, 1986)

IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF OKLAHOMA

CR-84-147-E

UNITED STATES OF AMERICA,
Plaintiff,

v.

MOBILE MATERIALS, INC., MOBILE MATERIALS COMPANY; and GERALD O. PHILPOT,
Defendants.

ORDER

The defendants have filed the following motions for the Court's consideration: A Motion for New Trial pursuant to Rule 33, Fed. R. Crim. P. and a Renewed Motion for Judgment of Acquittal pursuant to Rule 29, Fed. R. Crim. P.

This case was tried before the Court and a verdict was rendered by the jury on March 12, 1986. Defendants Mobile Materials, Inc., and Gerald O. Philpot were convicted of one count of Sherman Act Conspiracy and one count of false swearing.

In their Motion for New Trial, the defendants cite several propositions of legal and procedural errors which

they contend denied them the right to a fair trial in this matter. After a careful examination of the defendants' specified grounds for a new trial and the government's response brief, the Court finds that the defendants' trial was not conducted in a manner which resulted in unfairness to the defendants. The Court, however, finds that the defendants' stated ground for a new trial based upon alleged juror misconduct is deserving of further inquiry. The allegations of juror misconduct will be reviewed by the Court upon resolution of defendants' Motion for Leave to Interview Jurors, filed on April 1, 1986.

Accordingly, the defendants' Motion for New Trial is hereby OVERRULED, except to the extent that it raises allegations of juror misconduct, in which case said allegations will be resolved through the defendants' Motion for Leave to Interview Jurors.

In the defendants' Renewed Motion for Judgment of Acquittal, the defendants raise several grounds which they claim entitle them to an acquittal. Again, the Court has carefully considered the arguments and briefs of counsel and finds that the conviction cannot be challenged on the grounds set forth in the defendants' motion. Accordingly, the defendants' Renewed Motion for Judgment of Acquittal is hereby OVERRULED.

The Clerk of Court is directed to mail a copy hereof to counsel of record.

DATED this 9 day of April, 1986.

/s/ Luther B. Eubanks
Luther B. Eubanks
United States District Judge

(May 8, 1986)

[2] IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF OKLAHOMA

CR-84-147-E

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

GERALD O. PHILPOT, MOBILE MATERIALS, INC.,
AND MOBILE MATERIALS COMPANY,
Defendant.

OFFICIAL COURT REPORTER'S TRANSCRIPT OF PROCEEDINGS HAD ON MAY 8TH, 1986

BEFORE THE HONORABLE LUTHER B. EUBANKS, IN OKLAHOMA CITY, OKLAHOMA.

REPORTED BY:

Mary E. (Liz) Waggoner, C.S.R.
Official Court Reporter
3315 U.S. Courthouse
200 N.W. 4th
Oklahoma City, Oklahoma 73102
(405) 232-3490

[3] APPEARANCES

Appearing on Behalf of the United States of America:

Mr. Laurence K. Gustafson
Attorney at Law
Antitrust Division
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1100 Commerce Street
Dallas, Texas 75242

Also appearing:

Mr. Kent Gardiner
Ms. Jane E. Phillips
Attorney's at Law
Antitrust Division
U.S. Department of Justice
1100 Commerce Street
Dallas, Texas 75242

Appearing on Behalf of the Defendants:

Mr. Mack M. Braley
Attorney at Law
Suite 320
1516 Boston Avenue
Tulsa, Oklahoma 74119

[4] PROCEEDINGS

THE COURT: Very well. We have sentencings this morning on three cases.

First is the United States vs. Gerald O. Philpot and Mobile Materials Inc. The record should show the individual defendant, Gerald O. Philpot stands before the bar in person with his privately retained counsel, Mr. Mack Braley. The corporate defendant, Mobile Materials Inc. appears—well, I guess, at least it's fair to say through counsel.

The company has been dissolved a long time ago and I guess that's about as much as can be said. At least, there's not any failure to appear on behalf of the corporate entity or prior corporate entity. May I inquire of Mr. Philpot, have you read the pre-sentence report, Mr. Philpot?

MR. PHILPOT: I have, Your Honor.

THE COURT: And your lawyer has also. Do you find any errors in it, any mistakes that should be corrected?

MR. PHILPOT: Nothing.

THE COURT: Subtractions or nothing of any material nature?

All right. And does that pertain to the corporate entity as well?

MR. PHILPOT: Correct.

THE COURT: You have read it and also, Mr. Braley has. Is there any just cause to advance, legal or [5] otherwise, why we should not impose sentencing this morning after hearing from you? A statement from you?

MR. PHILPOT: No.

THE COURT: Do either know of any?

MR. BRALEY: None, Your Honor.

THE COURT: Well, Mr. Philpot, you may now give me any information that you believe might tend to mitigate the punishment and your lawyer can also speak for you when you are finished. You might, while you are at it, if you wish, speak both for yourself and for the now dissolved corporate entity, Mobile Materials Inc.

MR. PHILPOT: Well, of course, there's no separating the corporation and myself because it was me. I can only say, Your Honor, that letters submitted on my behalf, I think, show that I have been a decent citizen in all the years and it didn't start after I was indicted.

It has been a way of life with me all my life and I realize full well that I have been, you know, convicted by twelve people up here and it's your task at this time to sentence me.

I don't begrudge you that at all and I'll say that the Government offered to, if I would turn state's evidence and agree to certain changes prior to the time we came to trial.

I didn't feel that I had done anything wrong then and on all the charges, I didn't feel I had done anything wrong [6] on a portion of the charges and I know that you will not hold that against me for standing up for my rights.

THE COURT: Oh, certainly not. Certainly not. That's a constitutional right. And I will not only not hold it against you, I respect you for it.

Mr. Braley, go ahead.

MR. BRALEY: Thank you, Your Honor. In my brief appearance in this matter, Your Honor, I have been here as Mr. Philpot's counselor. I appear today as his friend and one of his many admirers.

Mr. Philpot, the crime of which he was convicted, he cannot ask for mercy because he relies again and his morals dictate he must confess his guilt and publicly pronounce it before he can ask for mercy.

So we do not ask for mercy. But I do ask the court to consider what an appropriate sentence in this matter should be and ought to be.

And I respectfully submit that as one of the letters that was written to you by another prominent member of the bar pointed out, this case cries out for leniency. Mr. Philpot's record prior to the time he was indicted was one of consistent and continuous, as he said, decent and selfless public work as well as an industrious businessman.

The jury found him guilty at the close of his career as a road builder, a participant in bid rigging on one single [7] job.

There's no other way to interpret that verdict. Now, although the Government claims and proved to the jury's satisfaction that that job was tied into the long running conspiracy that they charged, the only participation that the jury found Mr. Philpot had was in was the single one there in Ada.

I submit, Your Honor, that for this court to sentence this man to a prison term would say to all others such as him that a lifetime of good work is not suffi-

cient to excuse you from a single stumble or mitigate a single stumble once in your life.

And I submit that is not a message that needs to be seen, Your Honor, and I respectfully and earnestly submit to the court that this man on the crimes that have been charged and found, this man should not see the inside of the federal penitentiary.

THE COURT: Well, thank you. I would hesitate to characterize the conduct as a single stumble.

By its verdict, the jury found that he did willfully and knowingly and feloniously and deliberately enter into a conspiracy to rig prices.

That's not a stumble. That's a very, very serious criminal offense.

And despite the prior good record, the punishment [8] should be commensurate with the seriousness of the offense.

It's going to be the judgment and sentence of the court with respect to the corporation, Mobile Materials, Inc., that entity pay a fine of five hundred thousand dollars on Count 1 and that that corporate entity pay a fine of ten thousand dollars on Count 3.

With respect to the individual defendant, Gerald O. Philpot, it's the judgment and sentence of the court and you are hereby sentenced to the custody of the attorney general for a period of three years on Count 1 and that you pay a fine of one hundred thousand dollars.

On Count 3, the identical three year sentence imposed, but the sentence imposed in Count 3 will run concurrent with that imposed in Count 1 and with respect to Count 3, it's the order of the court that you pay a fine of ten thousand dollars.

It's my duty under the law and you have an excellent lawyer that already knows this, but making it part of the record, that you have a right to appeal and if you wish to appeal and are unable to pay the costs or if you're indigent, you may apply to this court for leave to file your appeal at the expense of the Government in forma pauperis, if you so request and the clerk will give notice on your behalf and on behalf of the corporate entity of the notice to appeal.

Now, I would rather suspect there will be an appeal. [9] So, let me say now that I'll give you, oh, ten days ought to be sufficient time, wouldn't it be, Mr. Braley, to post an appeal bond?

It needn't be a big one as far as I'm concerned. Fifteen thousand dollar bond is adequate for the individual and you'll have—I'm not going to require any bond for the corporate entity and I'm anticipating that there will likely be an appeal stay. So, an endeavor to collect the fine for the ten days period if the notice of appeal is filed and in effect within that time, then it stays all endeavors to collect the fine until after, if ever, the judgment of conviction is affirmed on appeal.

Now, let me say this, Mr. Philpot and I do not intend what I'm about to say is any promise at all. But I just let you know, that under the rules of this court, the federal—not this court; they're national rules, Rule 35 of the federal rules of criminal procedure, I have the right to modify the sentence I have just imposed provided that I act within one hundred and twenty days of the date the sentence is imposed or within one hundred and twenty days from any affirmance if there be any.

I cannot adjust a sentence upward. I can only bring it down. That's the reason that I have started it rather

high. So that if intervening cases and I have others matters come along and somebody's treated differently, then maybe I [10] will. I'm not implying to you that I will but, I can always bring it down. Could not raise it in any event.

But that gives me the option and we'll see what happens to some of these others that are accused and particularly see some of the plea bargaining that the Government has entered into and people that are not prosecuted at all for conduct that may be as bad or worse than your conduct and that appeals to me.

This matter of just out right immunity to others plea bargaining reduction on the charges is quite a different thing, but all of those things will be taken into account if and when your conviction is affirmed and it may be reversed. There's some question in it that I concede of a rather serious nature and I'm quite sure that an appeal would not be of a frivolous nature and that your lawyer anticipates that an appeal be taken.

All right. Any questions?

MR. BRALEY: Pursuant to Rule 9, is Mr. Philpot's execution of the terms of the appeal also stayed pending the appeal, Your Honor?

THE COURT: Yes.

MR. BRALEY: I believe you have to make an affirmative finding under the new—

THE COURT: I find all of those factors including what I just said, the last statement there. That any appeal [11] on his behalf would not be a frivolous one at all.

There's some serious questions and I'm not going to say that I think the cause would be reversed. I don't need to go that far.

If I believed that, I would have granted you a new trial or would have granted one when the matter was before me.

But there's no problem at all.

Would you prepare the findings and be sure it's in keeping, Mr. Braley, with the new criminal procedure appeal and get Mr. Gustafson to approve it as to form? Would you do that?

MR. BRALEY: Yes, sir; Your Honor.

THE COURT: Now, anything further?

MR. BRALEY: No, Your Honor.

THE COURT: Thank you. All right. You may be excused.

[12] (Certificate Omitted in Printing)

(Filed September 5, 1986)

IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF OKLAHOMA

CR-84-147-E

Oklahoma City, Oklahoma
DATE: September 18, 1986

UNITED STATES OF AMERICA,
Plaintiff,

v.

MOBILE MATERIALS, INC.; et al,
Defendants.

TO: ROBERT D. DENNIS, Clerk of Court

Please enter the following minute order in the above-entitled case:

The motion of each defendant to reduce sentence, filed herein September 5, 1986, is DENIED. However, this denial is entered specifically without prejudice to the right to reconsider the same if and when the conviction(s) of either or both defendant(s) is/are affirmed.

/s/ Luther B. Eubanks
Luther B. Eubanks
United States Senior District Judge

Clerk to notify.

(Dated September 12, 1989)

IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF OKLAHOMA

Oklahoma City, Oklahoma
DATE: September 12, 1989

Case No. CR-84-147-P

UNITED STATES OF AMERICA,
Plaintiff,

vs.

MOBILE MATERIALS, INC.; MOBILE MATERIALS COMPANY; and GERALD O. PHILPOT,
Defendants.

TO ROBERT DENNIS, CLERK OF THE COURT:

Please enter the following minute order in the above entitled case:

After careful consideration defendants' renewed motion to reduce sentences pursuant to Rule 35 of the Federal Rules of Criminal Procedure are DENIED.

IT IS SO ORDERED.

/s/ Layn R. Phillips
Layn R. Phillips
United States District Judge

Counsel Notified .....
Clerk to Notify XXX

Table H-13
U.S. District Courts
Disposition of Defendants Charged with **Antitrust Violations**
Showing Convicted and Not Convicted
During the Twelve Month Periods Ended June 30, 1970 through 1985

Year	Total Defendants	Not Convicted				Convicted and Sentenced				
				Acquitted by			Plea of		Convicted by	
		Total	Dismissed[1]	Court	Jury	Total	Guilty	Nolo Contendere[2]	Court	Jury
1970 ...	119	6	6	-	-	113	104	-	-	9
1971 ...	57	13	1	-	12	44	43	-	1	-
1972 ...	59	-	-	-	-	59	54	-	-	5
1973 ...	130	6	-	-	6	124	103	-	19	2
1974 ...	115	8	4	2	2	107	104	-	1	2
1975 ...	123	11	11	-	-	112	106	-	3	3
1976 ...	245	70	50	14	6	175	154	-	8	13
1977 ...	188	27	5	-	22	161	158	-	2	1
1978 ...	221	55	23	1	31	166	144	-	-	22
1979 ...	243	13	4	-	9	230	219	-	1	10
1980 ...	118	35	11	-	24	83	74	-	4	5
1981 ...	213	56	27	-	29	157	148	-	-	9
1982 ...	159	12	3	-	9	147	106	28	-	13
1983 ...	180	36	18	-	18	144	108	23	-	13
1984 ...	212	39	5	-	34	173	117	28	-	28
1985 ...	157	26	14	1	11	131	84	27	2	18

[1] Beginning in 1968, defendants who were committed pursuant to Title 28 U.S.C. Section 2902(b) of the Narcotic Addict Rehabilitation Act are included in the dismissed column through 1981.

[2] Prior to 1982, pleas of nolo contendere are included with pleas of guilty.

Note: The District of Columbia is excluded from the data through 1973. The territorial courts of the Virgin Islands, Canal Zone, and Guam are excluded through 1976.

Table H-13a
U.S. District Courts
Disposition of Defendants Charged with **Antitrust Violations**
Showing Type of Sentence
During the Twelve Month Periods Ended June 30, 1970 through 1985

Year	Total Imprisonment	Regular Sentences to Imprisonment[1]					Other Sentences To Imprisonment			Probation[2]						Fine and Other[7]
		1-12 Months	13-35 Months	36-59 Months	60 Mos. and Over	Average Sentence in Months[3]	Split Sentences[4]	Indeterminate[5]	Y.C.A. or Y.O.[6]	Total	1-12 Months	13-24 Months	25-36 Months	37 Mos. and Over	Average Sentence in Months	
1970 ...	3	-	-	-	-	-	3	-	-	9	-	-	-	-	-	101
1971 ...	7	-	-	-	-	-	7	-	-	-	-	-	-	-	-	37
1972 ...	-	-	-	-	-	-	-	-	-	13	-	-	-	-	-	46
1973 ...	5	3	1	-	1	-	-	-	-	8	-	-	-	-	-	111
1974 ...	16	13	-	1	-	-	2	-	-	29	-	-	-	-	-	62
1975 ...	8	4	-	-	-	-	4	-	-	31	-	-	-	-	-	73
1976 ...	-	-	-	-	-	-	-	-	-	37	-	-	-	-	-	138
1977 ...	5	5	0	0	0	-	0	-	-	27	-	-	-	-	-	129
1978 ...	21	4	-	-	-	-	17	-	-	32	20	8	4	-	16.2	113
1979 ...	17	5	-	-	-	-	12	-	-	52	33	14	2	3	18.8	161
1980 ...	9	5	-	-	-	-	4	-	-	24	7	6	10	1	26.8	50
1981 ...	52	33	1	1	-	4.1	17	-	-	33	5	12	13	3	28.4	72
1982 ...	48	18	2	5	-	11.3	23	-	-	27	2	10	1	14	41.4	72
1983 ...	31	23	1	-	-	3.3	7	-	-	39	6	16	9	8	31.8	74
1984 ...	33	14	1	-	-	4.7	18	-	-	46	10	15	11	10	30.0	94
1985 ...	19	6	3	-	-	7.1	10	-	-	41	4	10	23	4	32.4	71

1 Includes sentences of more than six months which are to be followed by a term of probation (mixed sentences).
2 Prior to 1978, probation terms and average sentences are not shown separately.
3 Excludes split sentences, indeterminate sentences Youth Corrections Act/offender sentences (This Act Repealed 10-14-84), and life sentences beginning in 1978.
4 A split sentence is a sentence on a one count indictment of six months or less in a jail type institution followed by a term of probation, Title 18 U.S.C. Section 3651. Included in these figures are mixed sentences involving confinement for six months or less on one count, to be followed by a term of probation on one or more other counts.
5 Title 18 U.S.C. Sections 4205 B (1) and (2). Included in Total Imprisonment prior to 1978.
6 Title 18 U.S.C. Section 5010 (B)(C) (Repealed 10-14-84). Included in Total Imprisonment prior to 1978.
7 Includes deportation, suspended sentences, imprisonment for four days or less or for time already served, remitted and suspended fines.

• Split sentences are included in prison terms "1 - 12 months."

Note: The District of Columbia is excluded from the data through 1973. The territorial courts of the Virgin Islands, Canal Zone, and Guam are excluded through 1976.

No. 89-631

In the Supreme Court of the United States

OCTOBER TERM, 1989

GERALD O. PHILPOT AND MOBILE MATERIALS, INC.,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General
JAMES F. RILL
Assistant Attorney General
MICHAEL BOUDIN
Deputy Assistant Attorney General
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QUESTIONS PRESENTED

1. Whether the Sherman Act conspiracy charge in the indictment was impermissibly vague.

2. Whether petitioners' sentences violated the Eighth Amendment.

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In the Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-631

GERALD O. PHILPOT AND MOBILE MATERIALS, INC.,
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v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A4-A50) is reported at 871 F.2d 902. The court's opinion on rehearing (Pet. App. A53-A76) is reported at 881 F.2d 866.

JURISDICTION

The judgment of the court of appeals was entered on March 22, 1989. The opinion of the court of appeals on rehearing was entered on July 28, 1989. A suggestion for rehearing en banc was denied on July 28, 1989. Pet. App. A1-A2. By an order dated September 13, 1989, Justice White extended the time for filing a petition for a writ of certiorari to and including October 26, 1989. The petition

was filed on October 14, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

On August 22, 1984, a grand jury in the Western District of Oklahoma returned a seven-count indictment against petitioner Mobile Materials, Inc. (the Corporation), Mobile Materials Company (the Partnership), and petitioner Gerald O. Philpot, President of the Corporation and a managing partner of the Partnership. All three defendants were charged with one count of bid-rigging in violation of Section 1 of the Sherman Act (15 U.S.C. 1). In addition, petitioners were charged with two counts of making false and fraudulent statements (18 U.S.C. 1001), and all three defendants were charged with four counts of mail fraud (18 U.S.C. 1341). Pet. App. A77-A91. On March 12, 1986, a jury convicted petitioners of the Sherman Act violation and on one of the false statement counts. On May 8, 1986, petitioner Philpot was sentenced to three years' imprisonment for each conviction, with the sentences to run concurrently. In addition, he was fined $100,000 for the Sherman Act violation and fined $10,000 for the false statement. The Corporation was fined $500,000 for the Sherman Act violation and $10,000 for the false statement. Pet. App. A105-A108, A127.

1. With respect to the Sherman Act count, the indictment charged that beginning "at least as early as July 1978, and continuing thereafter at least through February 1982" petitioners and their co-conspirators engaged in a conspiracy "to submit collusive, noncompetitive, and rigged bids to, or to withhold bids from, the Oklahoma Department of Transportation and the Oklahoma Turnpike Authority for the award of highway construction projects, some of which were federally funded." Pet. App. A83. The indictment

related that, "[f]or the purpose of forming and effectuating the * * * combination and conspiracy," petitioners and their co-conspirators (1) discussed "the submission of prospective bids on highway construction projects in Oklahoma"; (2) agreed "upon the successful low bidder on highway construction projects in Oklahoma"; (3) submitted "intentionally high, noncompetitive bids, or with[held] bids, on highway construction projects in Oklahoma"; and (4) submitted "bid proposals on highway construction projects in Oklahoma containing false, fictitious and fraudulent statements and entries." *Id.* at A83-A84.

Shortly after the indictment was returned, the government supplied petitioners with a bill of particulars identifying co-conspirators by name and company affiliation, and listing 11 specific projects that were alleged to be part of the bid-rigging scheme perpetrated by petitioners and their co-conspirators. Pet. App. A92-A101. Six weeks before trial, the government served an amended bill of particulars, deleting one project from its earlier list and specifying six of the previously identified projects that would be presented as evidence of petitioners' participation as well as four of the previously identified projects that would be mentioned during witnesses' testimony to explain the witnesses' participation in the conspiracy. *Id.* at A103-A104.

At trial, several witnesses representing Oklahoma's major highway contractors testified about the conspiracy and petitioners' involvement in it. Pet. App. A57-A67. Those witnesses established that petitioner Philpot, on behalf of the Corporation, rigged numerous bids. On appeal, petitioners "concede[d] the sufficiency of the evidence for a conspiracy concerning" three highway construction projects. *Id.* at A64.

2. The court of appeals affirmed. It held that the indictment was sufficient because it properly set forth the essential elements of the Sherman Act offense. The court

ruled that the indictment was not required to enumerate specific rigged highway projects or name co-conspirators. Pet. App. A7-A17. Judge McKay dissented on that issue. *Id.* at A38-A50. The court also held that the sentences were lawful because they were within the limits provided by statute and there was no evidence that the district court had "imposed sentence mechanically or failed to consider all the materials submitted in mitigation." *Id.* at A37.[1]

ARGUMENT

1. Petitioners contend (Pet. 10-23) that, with regard to the Sherman Act count, the indictment's lack of specificity violated the Fifth and Sixth Amendments. The court of appeals correctly held, however, that the indictment was not unconstitutionally vague.

"[A]n indictment is sufficient if it, first, contains the elements of the offense charged and fairly informs a defendant of the charge against which he must defend, and, second, enables him to plead an acquittal or conviction in bar of future prosecutions for the same offense." *Hamling* v. *United States*, 418 U.S. 87, 117 (1974). See also *Russell* v. *United States*, 369 U.S. 749, 763-764 (1962). The indictment in this case satisfied those criteria. It contained the elements of the Sherman Act offense—a single conspiracy to rig bids

[1] The court of appeals also rejected petitioners' arguments concerning the Speedy Trial Act (Pet. App. A17-A34); it refused to consider other arguments because petitioners had failed to designate relevant portions of the record (*id.* at A7-A8 & nn. 1 & 3). In response to petitioners' petition for rehearing, the court agreed to receive and review additional parts of the record. The court then rejected various arguments by petitioners, including claims that co-conspirators' statements were improperly admitted (*id.* at A56-A62) and that there was an impermissible variance between the indictment and the proof (*id.* at A63-A67). Petitioners do not renew any of these additional arguments in this Court.

on highway construction projects. It apprised the defendants of the specific charges they were required to meet – charges regarding their conduct in connection with the agreement to rig bids on proposals submitted to the Oklahoma Turnpike Authority and the Oklahoma Department of Transportation between July 1978 and February 1982. And it protected the defendants against subsequent prosecution for the same offense; petitioners do not argue to the contrary.

Petitioners' contention that the indictment merely "track[ed] the statutory language" (Pet. 12) and left "the identity of the conspirators, the method, time, place and nature of the conspiracy totally unspecified" (Pet. 13) is unfounded. The court of appeals correctly noted that the indictment "did more than track the statutory language; it described a conspiracy in restraint of trade." Pet. App. A17 (footnote omitted). As the court of appeals explained, the indictment specifically described the time of the conspiracy (July 1978 through February 1982); the place of the conspiracy (the Western District of Oklahoma); the means of the conspiracy (an advance agreement to establish the low bid on highway construction projects); and the effects of the conspiracy (a lessening of price competition in the highway construction industry). *Id.* at A10, A80-A84.[2]

Petitioners place extensive reliance (Pet. 10, 20-22) on *Russell* v. *United States*, 369 U.S. 749 (1962). In *Russell*, this Court found an indictment deficient because it did not identify, in a prosecution for a refusal to answer questions at a congressional hearing, "the subject under inquiry" (*id.* at 766); pertinency to the subject under inquiry was "the

[2] Petitioners are correct that the indictment does not identify the co-conspirators, but there is no constitutional or statutory requirement that an indictment identify co-conspirators. *Rogers* v. *United States*, 340 U.S. 367, 375 (1951). See also *United States* v. *American Waste Fibers Co.*, 809 F.2d 1044, 1046 (4th Cir. 1987); *United States* v. *Kramer*, 711 F.2d 789, 796 (7th Cir.), cert. denied, 464 U.S. 962 (1983).

very core of criminality" under the charging statute, and the subject of the inquiry was thus "central to every prosecution under the statute." *Id.* at 764. As the court of appeals concluded, however, the "indictment in this case is light years away from the indictment in *Russell*" because "the core of criminality under § 1 of the Sherman Act is conspiracy in restraint of trade," and the indictment specifically "describes this particular conspiracy." Pet. App. A14-A15. Petitioners fail to point to any element of a Sherman Act offense, or a comparable "core of criminality," that was not adequately identified in the indictment.

Petitioners similarly suggest (Pet. 10, 12, 20) that the decision in this case conflicts with other court of appeals decisions, including some of the Tenth Circuit's own precedents. Petitioners do not establish, however, any difference in the governing legal standard; the decisions cited by petitioners merely address the validity of particular indictments on their specific facts. Consistent with the standard applied by other circuits and by the Tenth Circuit itself, the indictment in this case adequately apprised petitioners of the charges against them.[3]

Proceeding from the erroneous assumption that the indictment was "vague" and "open-ended" (Pet. 13), petitioners claim that the purported vagueness prejudiced them because it permitted the introduction of otherwise inadmissible co-conspirator statements. Pet. 13-14. This objection, however, concerns the breadth of the charged conspiracy, not the specificity of the indictment. The court of appeals, moreover, correctly concluded (in a part of its judgment that petitioners do not challenge) that the admission of

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[3] To the extent that petitioners' claim rests on a contention that the Tenth Circuit's decision does not comport with its own precedents, moreover, the claim of an intra-circuit conflict is not a basis for this Court's review. *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957).

the co-conspirators' statements was proper because the admitted statements were made in furtherance of the conspiracy that petitioners had joined. Pet. App. A56-A62. Having failed to prevail in a direct challenge to the admissibility of the co-conspirators' statements, petitioners do not provide an adequate basis for challenging the admissibility of the statements under the rubric of vagueness.

Finally, petitioners contend that the purported vagueness of the indictment prejudiced them because it broadened the charges against which they were required to defend. Pet. 14-15. Petitioners suggest that the government should have been required to enumerate specific highway projects in the indictment. Pet. 15. As the court of appeals concluded, however, such an enumeration was not required, because an agreement to rig bids is itself a violation of the Sherman Act, and no further overt act need be alleged or proved. Pet. App. A15 (citing *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 225 n. 59 (1940)). In view of the bill of particulars, moreover, petitioners cannot claim that lack of specificity in the indictment led to unfair surprise or otherwise prejudiced their efforts to prepare a defense.[4]

2. Petitioners also contend (Pet. 23-29) that their sentences for the Sherman Act violations do not comport with the Eighth Amendment. They maintain that the three-

[4] Petitioners suggest that the court of appeals' reference to the bill of particulars is an impermissible attempt to save a "defective indictment" (Pet. 21-22); on the contrary, as the court of appeals observed (Pet. App. A13), the bill of particulars here served its traditional function of furnishing additional details regarding the charges in an entirely valid indictment. *United States* v. *Debrow*, 346 U.S. 374, 378 (1953). Similarly, petitioners erroneously contend that the failure to limit the indictment to the bill of particulars injects uncertainty about the basis for the grand jury's indictment (Pet. 21); as noted, the bid-rigging agreement charged in the indictment was itself the Sherman Act violation on which petitioners were indicted, tried, and convicted. See Pet. App. A69.

year sentence for petitioner Philpot (the maximum permitted under the statute) and the $500,000 fine for petitioner Corporation ("one half the maximum" permitted by the statute (Pet. 23)) are unconstitutionally disproportionate to the violations.

Petitioners' reliance on the analysis in *Solem* v. *Helm*, 463 U.S. 277 (1983), is misplaced. In *Solem*, this Court held that a sentence of life imprisonment without possibility of parole for the crime of uttering a $100 false check, under a recidivist statute that did not take into account the nature of the prior criminal convictions, was "significantly disproportionate" to the offense and thus violated the Eighth Amendment. 463 U.S. at 303. In reaching that conclusion, the Court considered the gravity of the offense and the harshness of the penalty, the sentences imposed on other criminals in the same jurisdiction, and the sentences imposed for commission of the same crime in other jurisdictions. *Id.* at 292.

The *Solem* analysis does not lead to a conclusion of disproportionality in this case. The first *Solem* factor is the gravity of the offense and the harshness of the penalty. Petitioners recognize that price-fixing is an extremely serious crime. Pet. 25. A three-year sentence and a corporate fine, furthermore, are far less harsh than, for instance, life imprisonment without possibility of parole, the penalty at issue in *Solem*.[5] Indeed, petitioners apparently recognize that the maximum three-year sentence is appropriate for some Sherman Act violations, but they claim that imposition of a maximum sentence requires a finding of special "factors" in

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[5] Petitioners fail to point out that petitioner Philpot's three-year sentence for the Sherman Act violation is to run concurrently with his three-year sentence for the false statement; petitioners do not challenge the concurrent three-year sentence for the false statement.

order for it to be valid. Pet. 25-26. *Solem* imposes no such requirement.[6]

Similarly, petitioners fail to establish that the other two factors of the *Solem* analysis—the treatment of other convicted defendants in the same jurisdiction, and the treatment of others convicted of the same crime in other jurisdictions—are satisfied. Petitioners argue, for instance, that Ray Broce (an unindicted co-conspirator in this case, Pet. App. A100) received only concurrent two-year sentences for Sherman Act violations and that Broce Corporation (also an unindicted co-conspirator, *ibid.*) received a corporate fine "only one-third higher" than petitioner corporation even though it had greater assets than petitioner Corporation. Pet. 26-27; see also *United States* v. *Broce*, 109 S. Ct. 757, 760 (1989) (describing sentences imposed on Broce and Broce Construction). These are far from the kinds of sentencing disparities that would give rise to Eighth Amendment violations, even if they were coupled with incongruities between the harshness of the sentences and the nature of the offense.[7]

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[6] In the capital punishment context, this Court has recognized that a proportionality challenge premised only on a comparison with others convicted of the same offense is "of a different sort" from a proportionality challenge premised on a claim that the punishment is inherently disproportionate to the offense. *Pulley* v. *Harris*, 465 U.S. 37, 43 (1984). See also *McCleskey* v. *Kemp*, 481 U.S. 279, 306 (1987).

[7] Petitioners also suggest that they have been penalized "for having stood trial" (Pet. 28) because the evidence at trial, the pre-sentence report, and various character letters supported "maximum leniency" (*ibid.*). A sentencing court's exercise of discretion in determining the proper sentence (before the advent of the current sentencing guidelines, as in this case) was generally unreviewable, except for specified infirmities. See, *e.g.*, *Dorszynski* v. *United States*, 418 U.S. 424, 431 & n. 7 (1974). As the court of appeals correctly found here, the district court's exercise of discretion contained no such infirmities. Pet. App. A36-A37.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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